Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, WARDEN, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

DAVID SCOTT DETRICH,

Respondent.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

In granting federal habeas corpus relief under 28 U.S.C. § 2254 based on a claim of ineffective assistance of sentencing counsel, the Ninth Circuit found that the state post-conviction court did not draw the "most reasonable inference" from evidence presented and thus "unreasonably determined the facts." Accordingly, the Ninth Circuit found that the state court ruling was not entitled to deference under AEDPA.

In light of this Court's recent decision in *Harrington v. Richter*, 562 U.S. ___ (filed Jan. 19, 2011), did the Ninth Circuit apply an incorrect standard of review and err by failing to defer to the state court's factual determinations and decision regarding Respondent's ineffective assistance claim?

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Charles L. Ryan, Director of the Arizona Department of Corrections (hereinafter "the State"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Arizona Supreme Court affirmed Respondent David Scott Detrich's convictions and death sentence on direct appeal, and this Court denied his petition for certiorari relief. (Pet.App.A.; Pet.App.B.) The state post-conviction court subsequently denied Detrich's petition for relief, and the Arizona Supreme Court denied review without comment. (Pet.App.C.; Pet.App.D.)

The United States District Court for the District of Arizona denied Detrich's habeas petition, but the United States Court of Appeals for the Ninth Circuit reversed, remanding the matter to the district court to issue a writ of habeas corpus vacating Detrich's death sentence. (Pet.App.E; Pet.App.F.)

STATEMENT OF JURISDICTION

The Ninth Circuit denied the State's request for rehearing and rehearing en banc on October 28, 2010. (Pet.App.G.) This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254 provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the

> judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

In reversing the district court's dismissal of Detrich's federal habeas petition, the Ninth Circuit improperly substituted its judgment for that of the state court and granted relief based on its assessment that the state court did not draw the "most reasonable" inference from the facts before it. The deferential standard of review set forth in 28 U.S.C. § 2254(d) requires more than a finding that a state court determination was not based on the "most reasonable" interpretation of the facts. Instead, federal courts reviewing a state court conviction are required to uphold a state court ruling unless there is no reasonable basis for the ruling.

In *Richter*, this Court reversed a Ninth Circuit ruling on federal collateral review and denounced the Ninth Circuit's failure to accord deference to state court decisions. This Court noted that the proper inquiry in reviewing a state court decision is not a de novo assessment of constitutional claims, but rather a determination of what arguments or theories support the state court ruling and whether fair-minded jurists could disagree that those arguments or theories are inconsistent with prior decisions from this Court. 526

U.S. ___, slip.op. at *11. As in *Richter*, the Ninth Circuit's ruling in the instant case granting federal habeas relief should be reversed.

A. Relevant State Court Proceedings

In 1989, Detrich kidnapped Elizabeth Souter in Arizona, sexually assaulted her at knifepoint, slit her throat and stabbed her approximately forty times, and eventually dragged her body into the desert. (Pet.App.A., at 3–4) After a jury convicted Detrich of first-degree murder, kidnapping, and sexual assault, the trial court sentenced Detrich to death for the murder conviction. On direct appeal, however, the Arizona Supreme Court reversed Detrich's kidnapping and murder convictions because of a defective jury instruction and remanded for a new trial on those charges. (*Id.*, at 5–6.)

Following a retrial, Detrich was again convicted of kidnapping and first-degree murder, and the trial court again sentenced him to death. The trial court found in aggravation the following factors: the victim's throat was cut from ear to ear, almost causing decapitation; the victim struggled for her life as reflected by numerous defensive wounds; the victim was alive during a significant portion of the time during which the wounds were inflicted; the victim suffered severe mental anguish and anxiety for a substantial portion of the approximate fifteen-minute period between her abduction at knife point from her house to being left in the desert; the victim experienced excruciating pain and suffering before losing consciousness based on the number and severity of the

stab wounds; Detrich relished the killing as reflected in his statement to his co-defendant, "It's dead but it's warm. Do you want a shot at it?"; the killing was senseless in that Detrich was not in physical risk from the victim; the victim was helpless and Detrich was able to not only kill her but make unwanted sexual advances on her. (Pet.App.A, 67–68.)

The Arizona Supreme Court upheld Detrich's convictions and sentences (Pet.App.A), and this Court denied certiorari review on October 6, 1997. (Pet.App.B.).

Detrich subsequently filed a petition for post-conviction relief in state court alleging, inter alia, that sentencing counsel was ineffective by failing to have a neuropsychologist testify on his behalf and by failing to present additional evidence of Detrich's abusive background. The trial court denied relief (Pet.App.C), and the Arizona Supreme court denied review of that decision. (Pet.App.D.)

B. Proceedings in Federal District Court

After exhausting state appellate and post-conviction remedies, Detrich filed a petition for writ of habeas corpus in federal district court raising, among other claims, the ineffective assistance of counsel claim at issue here. After allowing Detrich to present additional evidence through an evidentiary hearing, the district court found that the evidence presented did not significantly change the analysis of whether additional mitigation would have changed the sentencing decision. Although finding that Detrich

had proved the deficient performance prong of the *Strickland* analysis, the district court agreed with the state court that Detrich did not establish that he was prejudiced by counsel's alleged failure to develop and present additional mitigation evidence. (Pet.App.E.)

C. Proceedings before the Court of Appeals

A Ninth Circuit panel reversed the district court's decision. The panel found that counsel's deficient performance prejudiced Detrich at sentencing, and remanded the case to the district court to issue a writ of habeas corpus vacating Detrich's death sentence. (Pet.App.F.).

The Ninth Circuit denied the State's subsequent petition for rehearing and rehearing en banc. (Pet.App.G.).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Failed to Accord the State Court Decision the Deference Required Under AEDPA and This Court's Jurisprudence.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), factual determinations by the state court "shall be presumed to be correct" and can only be rebutted with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Federal habeas corpus relief is unavailable to a state prisoner on any claim adjudicated on its merits in state court unless the underlying state court decision: (1) is contrary to

then-existing federal law as clearly established by this Court; (2) involves an unreasonable application of such federal law; or (3) is based upon an unreasonable determination of the facts in light of the evidence before the state court. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412, (2000).

The state-court decision at issue is a ruling by the state post-conviction court (the same judge who sentenced Detrich to death) that counsel was not ineffective in failing to develop and present additional mitigation evidence.

Ineffective assistance of counsel claims are governed by this Court's ruling in *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984), which provides that relief on such claims should only be granted if a defendant demonstrates (1) deficient performance, and (2) resulting prejudice.

To be deficient, counsel's representation must have fallen "below an objective standard of reasonableness," and there is a "strong presumption" that counsel's representation is within the 'wide range' of reasonable professional assistance." *Id.* at 688-89. The question is whether counsel made errors so fundamental that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Prejudice requires demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In rejecting Detrich's ineffective assistance of

counsel claim, the state court properly applied *Strickland* and found as follows:

> Petitioner has not presented a colorable claim that trial counsel was ineffective at the sentencing stage of the proceedings for failing to have Dr. Briggs, a neuropsychologist, testify on Petitioner's behalf, or to present additional evidence of Petitioner's abusive background. After considering the initial psychological report, the presentence report, a sentencing memorandum, and written statements from Petitioner's sister citing multiple examples of both physical and mental abuse suffered by Petitioner as a child, this Court found statutory and non-statutory mitigating circumstances. Dr. Briggs' report was not significantly different from the report considered by this Court. Indeed, Dr. Briggs found that Petitioner's general neuropsychological functioning was normal and showed an absence of cognitive dysfunction. Therefore, there is no reasonable probability that this testimony would have compelled this Court to impose a sentence less than death. Moreover, additional evidence of Petitioner's dysfunctional childhood would have been merely cumulative and was not "newly discovered." This claim is summarily dismissed.

(Pet. App. C, at 3.)

The Ninth Circuit rejected this analysis as an "unreasonable determination of the facts" under § 2254(d)(2), and thus concluded that no deference was due to the state court ruling. After noting that the "only evidence" of Detrich's mental health before the sentencing court was a 1991 psychological evaluation by a court-appointed clinical psychologist, conducted at Detrich's counsel's request, and two 1985 psychological reports, the Ninth Circuit opined as follows:

> Had Detrich's trial counsel enlisted the assistance of a neuropsychological expert, he would have been able to offer an evaluation with much greater mitigating weight. An evaluation by neuropsychologist Dr. Briggs that Detrich presented to the state post-conviction court indicated that Detrich suffered neuropsychological deficits and opined that his crime was driven by instinct that grew out of his abusive childhood, not by consequence-driven thought or reason.
>
> The state post-conviction court concluded that there was no "reasonable probability" that this neuropsychological evaluation "would have compelled this Court to impose a sentence less than death." In support of this conclusion, the state court reasoned, "Dr. Briggs' report was not significantly different from the report considered by this Court. Indeed,

Dr. Briggs found that Petitioner's general neuropsychological functioning was normal and showed an absence of cognitive dysfunction."

This conclusion was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). To be sure, Dr. Briggs's report did state that Detrich earned scores on neuropsychological tests that were "in the normal range of neuropsychological functioning." But the state court failed to mention a critical part of Dr. Briggs's assessment: his report later makes clear that this reflected a "recovered picture," as "improvement in function occurs as time (and sobriety) from the incidents [of head injuries and drug use] increase." Significantly, the report indicated that Detrich scored 25 on a scale for which 0-26 represented "normal" neuropsychological functioning. In other words, over ten years after the crime, at the time of these tests, Detrich's neuropsychological functioning was just two points shy of abnormal. Thus, considering Dr. Briggs's finding of "normal" functioning in context, along with his statement that this represented a "recovered picture," *the most reasonable inference* is that Detrich's neuropsychological functioning was not

> normal at the time of the crime.
>
> The state court's failure to account for Dr. Briggs's statement that Detrich's functioning had improved since the time of the crime resulted in an unreasonable determination of the facts.

Detrich v. Ryan, 619 F.3d 1038, 1058–59 (9th Cir. 2010) (emphasis added).

The flaw in the Ninth Circuit's analysis is apparent from its assertion that "the most reasonable inference is that Detrich's neuropsychological functioning was *not* normal at the time of the crime." The proper analysis does not turn on the Ninth Circuit's view of the *most reasonable* inference to be drawn from the evidence, but rather whether "fair-minded jurists could disagree" on whether the state court decision was correct. *Harrington v. Richter*, 562 U.S. __, slip op. at 11 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The Ninth Circuit erred under 28 U.S.C. § 2254(d) and § 2254(e) because a reasonable factfinder could reach the conclusion drawn by the state court – that the mental health report submitted at the post-conviction proceeding "was not significantly different from the report considered by [the] Court [at sentencing]" and that the new report would not have changed the sentencing decision.

In *Richter*, this Court recently reversed the Ninth Circuit for failing to defer to the California Supreme Court's decision on the merits of a claim of ineffective assistance of counsel. The Court noted that,

in assessing claims of ineffective assistance of counsel, "'[s]urmounting *Strickland's* high bar is never easy.' *Id.* at *3. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* Furthermore, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is even more difficult, since both standards are 'highly deferential,' and since *Strickland's* general standard has a substantial range of reasonable applications. The question under § 2254(d) is not whether counsel's actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." Slip. op. at *3 (citations omitted.)

This Court then found that the Ninth Circuit's opinion "disclose[d] an improper understanding of § 2254(d)'s unreasonableness standard and of its operation in the context of a *Strickland* claim[,]" slip. op. at *10:

> Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a de novo review, 578 F.3d, at 952; and after finding a *Strickland* violation, it declared, without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." 578 F.3d, at 969. AEDPA demands more. Under § 2254(d), a habeas

court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)." *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under de novo review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. *See Renico v. Lett*, 559 U.S. ----, ----, 130 S.Ct. 1855, 1866, 176 L.Ed.2d 678 (2010). It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

See Lockyer, supra, at 75, 123 S.Ct. 1166.

Richter, at *11.

In the instant case, rather than conducting a meaningful inquiry into what arguments or theories supported or . . . could have supported, the state court's decision and the state court's factual determination, *see id.*, the Ninth Circuit essentially employed a de novo *Strickland* review.

Detrich is not entitled to relief on his ineffective assistance claim under a de novo standard of review, much less under the doubly deferential *Strickland*/AEDPA analysis. *See Richter*, slip. op. at 13; *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). The state court found substantial aggravation that was not outweighed by Detrich's mitigation evidence. The state court's decision rejecting Detrich's post-conviction claim on the basis that the newly proffered mitigation was essentially cumulative was not unreasonable. As the district court noted in rejecting Detrich's claim, "[i]n sum, despite extensive additional investigation into [Detrich's] background and mental health, [Detrich] has not discovered significant new or more weighty mitigation than was considered by the sentencing judge." (Pet.App. E, at 22 .)

CONCLUSION

The Ninth Circuit failed to give deference to the state court's decision and factual findings. The Ninth Circuit's opinion all but ignores the only question that matters – whether reasonable jurists could disagree

with the conclusion reached by the state court. This Court should grant the petition for writ of certiorari and affirm the district court's decision denying Detrich's federal habeas petition.

Respectfully submitted

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APPENDICES A-G

APPENDIX A

Supreme Court of Arizona,
In Banc.
STATE of Arizona, Appellee
v.
David Scott DETRICH, Appellant

No. CR-95-0085-AP
Feb. 25, 1997

Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section, Phoenix, Eric J. Olsson, Assistant Attorney General, Tucson, for Appellee.

Law Offices of Barbara C. Sattler by Barbara C. Sattler and Carrie D. Stopek, Tucson, for Appellant.

OPINION

MOELLER, Justice.

In his first trial, David Scott Detrich ("defendant") was convicted of first degree murder, kidnapping, and sexual abuse. This court affirmed the sexual abuse finding, reversed the murder and kidnapping convictions, and remanded for a new trial on the latter two charges. *State v. Detrich*, 178 Ariz. 380, 385, 873 P.2d 1302, 1307 (1994). On remand, a second jury found defendant guilty of first degree murder and kidnapping. The trial court sentenced defendant to twenty-one years for

kidnapping and to death for first degree murder. Appeal to this court is automatic. Ariz. R.Crim. P. 26.15 and 31.2(b). We have jurisdiction pursuant to Ariz. Const. art. VI, § 5(3) and Ariz.Rev.Stat. Ann. ("A.R.S.") § 13-4031. We affirm defendant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

Defendant and Alan Charlton[1] worked together at the Ocotillo Motors wrecking yard in Benson, Arizona. On November 4, 1989, a Saturday afternoon, defendant and Charlton left work and headed to a local bar. Charlton estimated that he and defendant each consumed between twelve and twenty-four cans of beer. Two hours after they started drinking, the men drove to Tucson.

Upon arriving in Tucson, defendant and Charlton visited several more bars and consumed more beer. At some point during the evening, defendant suggested that they "pick up" somebody. When the two men saw the victim, Elizabeth Souter, walking along the Palo Verde bridge, they stopped the car and Souter climbed in. Defendant asked her to help them obtain some cocaine. She agreed and directed the two men to a "roadhouse" where defendant and Souter purchased the

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[1] Co-defendant Charlton pled guilty to a single count of kidnapping and agreed to testify truthfully in exchange for a dismissal of the first degree murder charge. He was sentenced to ten and one-half years in prison.

cocaine.

The two men and Souter then drove to Souter's home, where defendant attempted to "cook a spoon," which entailed dissolving the cocaine in a spoon so that it could be injected. Defendant soon became angry because the syringe would not pick up the cocaine. Defendant began "screaming and hollering that the needle wasn't any good, or the cocaine wasn't any good." Defendant told Souter that she was going to pay for the bad drugs by having sex with him-"He told her they could go in the room or do it right there, or they would do it his way, and she did not want to do it his way." Three witnesses, Charlton, Tami Winsett, and Caprice Souter (the victim's daughter), confirmed that defendant was holding a knife against Souter's throat. Additionally, defendant threatened, "You must not believe me, I will kill you."

Defendant then told Souter, "Come on bitch, we are going for a ride." Souter, Charlton, and defendant climbed into Charlton's car. Charlton drove, defendant sat in the middle, and Souter sat up against the passenger door. Defendant ordered Charlton to drive out of town. Charlton testified that, while stopped at a red light, he looked at defendant and saw that defendant was "humping" Souter and asking her how she liked it. Moments later, Charlton again looked and saw that Souter's throat was slit. Charlton indicated that defendant then hit her and asked her who "she got the shit off of." Souter was unable to answer clearly; she just

gurgled something. Defendant then hit her with his elbow and asked again who she got the drugs from. She gurgled again in answer. Defendant then asked, "Did you say Mike?" Souter gurgled a third and final time, and Charlton heard no more sounds from her. Although Charlton claims he never saw defendant actually stab Souter, Charlton was himself poked in the arm with the knife three or four times. The pathologist established that Souter was stabbed forty times.

At this point, defendant asked Charlton, "It's dead but it's warm. Do you want a shot at it?" Charlton declined. They drove to a remote area approximately fifteen minutes (seven to nine miles) from Souter's home. Charlton pulled the car over at defendant's request, and defendant dragged Souter's body into the desert.

After dumping the body, Charlton and defendant drove to their friend William Carbonell's house in Tucson. Carbonell testified that the two men showed up at his house at 4:00 a.m. The defendant was covered with blood, but Charlton had blood only on his right side. Approximately an hour later, defendant confessed to Carbonell that he had killed a girl by slitting her throat. Defendant explained that he grabbed the girl at her house and forced her into Charlton's car at knife point, where defendant killed her. Defendant further explained that he killed Souter because the drugs she had purchased were bad.

After several days, Carbonell called in an

anonymous tip to the police, who were able to trace the call to Carbonell. After questioning Carbonell, the police went to Ocotillo Motors and arrested Charlton, who confessed his involvement in the crime. Defendant was arrested in New Mexico several days later in possession of a folding knife. Charlton identified the knife as his; however, he explained that it often fell out of his pants. Charlton confirmed that defendant possessed the knife the night of the murder. Charlton also noticed that defendant had the knife the morning after the murder and that it was covered with blood.

At his first trial, defendant was charged with first degree murder, kidnapping, and sexual assault.[2] The jury found defendant guilty of first degree murder, kidnapping, and sexual abuse, a lesser included offense of sexual assault. On appeal, we reversed defendant's convictions in part and remanded the case. We held that the trial court erred in failing to instruct on unlawful imprisonment, a lesser included offense of kidnapping, because the jurors rationally could have found that defendant lacked the requisite intent for the kidnapping charge, but was guilty of unlawful imprisonment. Because the jury could have based its first degree murder finding on a

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[2] Before the first completed trial, there was a mistrial when a state witness testified that defendant had invoked his Fifth Amendment rights. To prevent confusion, the phrase "first trial" identifies the first completed trial, not the mistrial.

felony murder determination with kidnapping as the predicate felony, the murder conviction, as well as the kidnapping conviction, was reversed. The sexual abuse conviction was affirmed.

Defendant was retried and convicted of the murder and kidnapping charges. Defendant was sentenced to death for the murder and to twenty-one years in prison for the kidnapping.

ISSUES PRESENTED

I. Trial Issues

A. Whether the doctrine of collateral estoppel should have barred introduction of witness Charlton's testimony at defendant's second trial.

B. Whether a statement in the prosecution's closing argument constituted a violation of defendant's double jeopardy rights.

C. Whether the trial court erred by not inquiring during jury voir dire about the jurors' racial attitudes, prejudices, and biases.

D. Whether the trial court erred by not submitting defendant's questionnaire to the jury.

E. Whether the trial court erred by dismissing three jurors for cause when they stated that their opposition to the death penalty would affect their deliberation.

F. Whether the state improperly exercised its peremptory strikes to remove jurors with beliefs against the death penalty.

G. Whether the trial court erred by not striking for cause two jurors who had some ties to law enforcement.

II. Sentencing Issues

A. Whether the murder was committed in an especially heinous, cruel, or depraved manner.

B. Whether the disparity in sentences between the defendant and the co-defendant was a mitigating factor.

C. Whether the trial court failed to properly balance the aggravating and mitigating factors.

DISCUSSION

I. TRIAL ISSUES

A. Collateral Estoppel

Because defendant was implicitly acquitted of sexual assault in his first trial, defendant claims that the doctrine of collateral estoppel bars the introduction of any evidence of sexual intercourse in the second trial. *See United States v. DiFrancesco*, 449 U.S. 117, 136, 101 S.Ct. 426, 437, 66 L.Ed.2d 328 (1980). The state contends, however, that the evidence is admissible for the

purpose of proving an element of kidnapping by showing intent to commit a sexual offense.

Collateral estoppel in criminal cases is an "integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments." *Harris v. Washington*, 404 U.S. 55, 56, 92 S.Ct. 183, 184, 30 L.Ed.2d 212 (1971) (citing *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)). Collateral estoppel bars the state from relitigating a fact question previously determined in defendant's favor. *State v. Luzanilla*, 176 Ariz. 397, 401, 861 P.2d 682, 686 (App.1993) (holding that a fact determination necessarily decided in a partial verdict is barred by collateral estoppel in the retrial of the remaining charges), *affirmed in part, vacated in part*, 179 Ariz. 391, 880 P.2d 611 (1994).

To invoke collateral estoppel on a specific issue, defendant has the burden of proving that the jury "acquitted him because it resolved in his favor the very issue that he seeks to foreclose from consideration in the second trial." *Luzanilla*, 176 Ariz. at 402, 861 P.2d at 687 (quoting *United States v. Mespoulede*, 597 F.2d 329, 333 (2d Cir.1979)). To determine the applicability of the doctrine, we must review the prior trial's record to determine whether the issue was "necessarily decided there." *Id.* at 401, 861 P.2d at 686. The United States Supreme Court promulgated, in *Ashe v. Swenson*, the standard for reviewing the prior trial record:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine that record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. "The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

Ashe, 397 U.S. at 444, 90 S.Ct. at 1194 (citations omitted). We examine defendant's first trial with this standard in mind.

In defendant's first trial, the state offered Charlton's testimony, recited above, concerning defendant's actions and words in the car on the fatal night. Specifically, the state introduced evidence that Charlton saw defendant "humping" Ms. Souter in the front seat and that defendant asked Charlton if he would like "a shot at it." The state also adduced evidence via the forensic pathologist that although there was no semen or sperm found within Ms. Souter's body, that fact did not rule out forced sexual intercourse.

At the close of the first trial, the trial judge instructed the jury on sexual assault and on sexual abuse, a lesser included offense of sexual assault. Sexual assault was defined as follows:

A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person. A.R.S. § 13-1406(A).

"Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object or manual masturbatory contact with the penis or vulva. A.R.S. § 13-1401(3) (amended 1993).

Sexual abuse was defined as follows:

A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person fifteen or more years of age without consent of that person. A.R.S. § 13-1404(A).

"Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals, anus or female breast. A.R.S. § 13-1401(2) (amended 1993).

The jury found defendant guilty of the lesser included offense of sexual abuse and thereby implicitly acquitted him of the greater offense of sexual assault. *See DiFrancesco*, 449 U.S. at 136, 101 S.Ct. at 437. In the second trial, therefore, no issue of sexual assault or sexual abuse remained. Nevertheless, the Charlton testimony was admissible because it was offered to prove an

element of the kidnapping charge, namely, defendant's intent to commit a sexual offense.[3]

Defendant argues that the theory of collateral estoppel bars the introduction of this evidence at the second trial because the issue of whether defendant engaged in sexual intercourse has already been determined in his favor. We believe defendant misconstrues the issue. For collateral estoppel to apply, "the issue sought to be relitigated must be precisely the same as the issue in the previous litigation." *State v. Jimenez*, 130 Ariz. 138, 140, 634 P.2d 950, 952 (1981). In the second trial, Charlton's testimony was not offered to prove sexual intercourse, sexual assault, or sexual abuse. Rather, it was offered, together with defendant's statements at Souter's home and testimony about Souter's half-nude body, to show defendant's *intent* to commit a sexual offense, an element of the offense of kidnapping. At the second trial, whether defendant actually had sexual intercourse with or sexually abused Ms. Souter was irrelevant; however, the state could, and did, offer the evidence to show that defendant *intended* to commit a sexual offense on the victim.

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[3] A.R.S. § 13-1304(A) states, in relevant part:

> A person commits kidnapping by knowingly restraining another person with the intent to:
>
> . . . . .
>
> 3. Inflict death, physical injury or a sexual offense on the victim.

Defendant contends that the implied acquittal of sexual assault means that the jury at the first trial necessarily decided that Charlton's testimony regarding his observations of sexual activity in the car was not credible. We believe this analysis is incorrect. Other than Charlton's testimony of what happened in the car, there is no other evidence of contact of a sexual nature. Thus, to find sexual abuse, the jury must have determined that Charlton saw defendant engage in some form of sexual contact, but that Charlton's description of what he saw and heard fell short of describing completed sexual intercourse.

Defendant suggests, as an alternative explanation of the first jury's finding, that the testimony of Tami Winsett and Caprice Souter describe conduct of defendant upon which the jury could have relied in finding sexual abuse. Our careful review of the record in the first trial, however, reveals that their testimony does not support this suggestion.

We conclude that defendant has failed in his burden of proving that the Charlton testimony was barred by the doctrine of collateral estoppel. *Luzanilla*, 176 Ariz. at 402, 861 P.2d at 687.

B. Double Jeopardy

Defendant claims that a statement in the prosecutor's closing rebuttal argument constituted, in effect, a second trial of defendant for sexual assault, in violation of his Fifth and Fourteenth

Amendment right to be free from double jeopardy. He made no contemporaneous objection to the argument in the trial court. Defendant also failed to support his argument on appeal with any citations to authority. *See* Ariz. R.Crim. P. 31.13(c)(1)(iv); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

Even if the issue is properly here, however, it avails defendant nothing. The double jeopardy guarantee protects against, *inter alia*, a "second prosecution for the same offense after acquittal." *State v. Nunez*, 167 Ariz. 272, 275, 806 P.2d 861, 864 (1991). In the present case, the prosecution's statement did not, in any way, rise to the level of a second prosecution on the sexual assault charge. The state did not accuse defendant of sexual assault; neither did it implore the jury to find him guilty of sexual assault. The prosecutor merely stated that what the defense was implying was an incorrect interpretation of the facts. Thus, defendant's double jeopardy claim fails.[4]

Questioning Jurors on Race Issues

Defendant argues on appeal that the trial court erred by failing to inquire during voir dire as to the

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[4] Because Charlton's testimony was not precluded by principles of collateral estoppel or double jeopardy, defendant's contention that the trial judge erroneously considered this evidence at sentencing is moot.

jurors' racial attitudes, prejudices, or biases. The state argues that defendant waived this issue by failing to object at the time of the alleged error and also by failing to sufficiently argue this claim on appeal. We agree with the state.

Defendant argues that his proposed jury voir dire questionnaire, which was not utilized, sufficiently voiced his objection to the court's decision not to ask the jury questions about race. The purpose of a contemporaneous objection requirement is to allow for an immediate remedy for potentially improper or unconstitutional activities. *Harris*, 157 Ariz. at 36, 754 P.2d at 1140. This principle applies with full force to matters arising during the jury selection process. *Id.* Implicit in this rule is the need to bring to the attention of the trial judge the specific activity (or lack of activity) complained of so that the judge may effect an immediate remedy.

When the judge denied the motion to provide the jury with defendant's written questionnaire, he indicated that he would incorporate some of the proposed questions into his selection procedures, and he would give the attorneys the opportunity to raise any other concerns or questions they might have during the questioning procedure. The judge completed his questioning without asking the jurors any questions about race issues. Defendant then passed the panel of jurors without ever objecting to the court's failure to question the jurors about race. *See State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989) (holding that

defendant "cannot object to the [jury] panel once he has approved it") (citations omitted), *aff'd*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

Only the last four questions[5] in defendant's three-page questionnaire addressed race. Because the race questions constituted such a de minimis portion of the questionnaire and because defendant failed to object contemporaneously to the absence of such questions, the questionnaire and the court's concomitant denial did not bring to the court's attention the defense's objection sufficiently to allow the court an opportunity for immediate remedy. Furthermore, defendant failed to support his argument on appeal with any citations to authority. Mere assertions of error are insufficient to persuade us. The issue is waived.

D. Failure to Submit Questionnaire to Jurors

Defendant separately claims that the trial judge's failure to use his questionnaire precluded defendant from determining the jurors' prejudices

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[5] The four questions on race were as follows:

1. What is your race?

2. Do you live in an integrated neighborhood?

3. Describe your relationship with any black friends, co-workers or acquaintances.

4. Do you believe blacks are more prone to commit crimes than white people? Explain.

and, consequently, denied defendant the right to intelligently exercise his peremptory challenges and challenges for cause. We believe this issue is also waived for failure to make a specific contemporaneous objection, but it is, in any event, meritless.

Defendant has not shown that the judge's failure to submit his questionnaire to the jury "resulted in a biased jury or rendered his trial fundamentally unfair." *See* State v. Walden, 183 Ariz. 595, 608, 905 P.2d 974, 987 (1995), *cert. denied,* 517 U.S. 1146, 116 S.Ct. 1444, 134 L.Ed.2d 564 (1996). Defendant offers no evidence of bias or prejudice of the jurors, but merely argues that we cannot "be sure that racial animus did not tip the scales." Defendant further contends that if race had been considered during voir dire, a juror with strong racial feelings *could have* raised his or her hand to indicate potential bias or prejudice. However, this speculation is insufficient to meet defendant's burden of proving that he was not provided a fair and impartial jury. *See id.; State v. Blackhoop,* 162 Ariz. 121, 122, 781 P.2d 599, 600 (1989); *State v. Arnett,* 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978).

Defendant cites to the recently amended Rule 18.5(d),[6] Ariz. R.Crim. P. Although the rule refers

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[6] Rule 18.5(d) states in relevant part: "Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral
(Continued)

to jury questionnaires, it does not, in any way, require the submission of such questionnaires. The extent of voir dire examination is left to the sound discretion of the trial court. *State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App.1989); *Smith*, 114 Ariz. at 418, 561 P.2d at 742. After reviewing the transcript of the jury voir dire examination and the proposed questionnaire, we find that the trial judge did not abuse his discretion by not submitting the questionnaire to the jury.

E. Death Qualification of the Jury

Defendant contends that the trial judge erred in excusing three jurors because of their views on capital punishment. Although defendant orally objected to death qualification prior to voir dire, the objection was general in scope and did not constitute an effective objection to individual jurors. In *State v. Hyde*, 186 Ariz. 252, 921 P.2d 655 (1996) we held that objections to death qualification and objections to dismissal of individual jurors for death penalty views presented two separate issues. 186 Ariz. at 278, 921 P.2d at 681. *Hyde* held that "[d]efendant's objections to death qualification in general cannot extend to his argument on appeal that the trial court erroneously and prejudicially dismissed certain jurors for cause." *Id.* We further held that defendant's failure to object specifically to each

(Continued)

examination."

juror's dismissal waived the claim, absent fundamental error. *Id.*

We therefore review the record to see whether fundamental error occurred. *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). We have adopted the standard set forth in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), that a juror may be dismissed if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424, 105 S.Ct. at 852 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)); *Bolton*, 182 Ariz. at 301, 896 P.2d at 841; *State v. LaGrand*, 153 Ariz. 21, 33, 734 P.2d 563, 575 (1987); *State v. Martinez-Villareal*, 145 Ariz. 441, 449, 702 P.2d 670, 678 (1985).

We have construed the *Wainwright* standard such that "[d]isqualification when a juror states his inability to be impartial is not only permissible but imperative." *Hyde*, 186 Ariz. at 277, 921 P.2d at 680 (quoting *State v. Wiley*, 144 Ariz. 525, 534, 698 P.2d 1244, 1253 (1985), *overruled on other grounds by State v. Superior Court*, 157 Ariz. 541, 544, 760 P.2d 541, 544 (1988)). The "bottom line is whether [a juror] can be fair and impartial, despite any feelings [he or she] might have about the death penalty." *Hyde*, 186 Ariz. at 278, 921 P.2d at 681.

All three of the excused jurors expressly confirmed that their views on the death penalty

would interfere with their deliberations in the guilt phase of this case. Having clearly indicated their inability to be impartial, they were properly excused for cause. We find no error in that regard, let alone fundamental error.

F. State's Use of Peremptory Challenges

Defendant next argues that the state improperly exercised its peremptory strikes to remove jurors with beliefs against the death penalty, claiming that this violated defendant's Sixth, Eighth, and Fourteenth Amendment rights to a fair and impartial jury. Defendant asks us to extend *Batson* to cover jurors excluded on the basis of their death penalty views. *See* *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Batson* held that a prosecutor may not challenge potential jurors solely on account of their race. *Id.* at 88, 106 S.Ct. at 1719. We have previously addressed this issue and decided not to extend *Batson* 's purview to encompass death penalty views. *Bolton*, 182 Ariz. at 302, 896 P.2d at 842. We again decline to do so.

G. Denial of Motions to Strike Jurors for Cause

Defendant claims that the trial judge erroneously declined to strike two jurors for cause.[7]

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[7] Defendant initially indicated that the trial judge improperly refused to strike four jurors for cause. However, two of the jurors were subsequently stricken by the state. As a result, defendant was unharmed by the court's failure to strike those

(Continued)

We will not set aside a trial court's decision to deny a request to excuse a juror for cause absent a clear showing that the trial court abused its discretion. *State v. Bible*, 175 Ariz. 549, 574, 858 P.2d 1152, 1177 (1993); *State v. Hill*, 174 Ariz. 313, 319, 848 P.2d 1375, 1381 (1993). Defendant insists that the trial court's failure to dismiss for cause jurors Carpenter and Sigrest forced defendant to use peremptory strikes to remove the two jurors. Defendant was concerned that Carpenter's and Sigrest's close relationships with law enforcement would affect their impartiality.[8] Law enforcement ties, however, without some finding of partiality, are insufficient to disqualify jurors. *State v. Pawley*, 123 Ariz. 387, 389, 599 P.2d 840, 842 (App.1979).

Five times during the jury voir dire Mr. Carpenter unequivocally confirmed that he would be impartial. First, Mr. Carpenter voluntarily

(Continued)

two jurors for cause. Thus, we will address only the two not stricken by the state.

[8] Mr. Carpenter's relationship with law enforcement consisted of working in industrial security, doing ride alongs with the Tucson Police and the Sheriff's department every couple of months, and intending to test for the Sheriff's Department a month after the trial. Additionally, Mr. Carpenter's future father-in-law and five of his closest friends, including his best man, worked for the Tucson Police Department or the Pima County Sheriff's Department.

Ms. Sigrest's relationship with law enforcement consisted of having a grandson who was a deputy with the Pima County Sheriff's Department.

approached the judge, explained his ties to law enforcement, and explicitly confirmed that those ties would "have no bearing on [his] decision." Second, in response to a later question as to whether his law enforcement ties would affect him as a juror, Mr. Carpenter replied in the negative. Third, although Mr. Carpenter said "I could be impartial, but I got to believe that he may be guilty for something because the detective is here and he is in court," the judge immediately again asked Mr. Carpenter if his law enforcement associations would affect his ability to be impartial. Again Mr. Carpenter said no. On the fourth occasion, the judge made the following statement:

> In a criminal trial the burden of proof is on the state to prove their case beyond a reasonable doubt before there could be a verdict of guilty on either of these counts. A Defendant in a criminal trial is presumed to be innocent. That presumption of innocence means that the Defense has no obligation to call witnesses to testify, they don't have to introduce any physical evidence in the course of the trial. The Defendant has the right to testify or refuse to testify as he and [defense counsel] choose.... I need to know if anyone would be unable to follow those principles of law if you are chosen to be on this jury? Mr. Carpenter, do you think that would be a problem for you?

To which Mr. Carpenter responded, "no sir."

Fifth and last, the judge said:

> I was talking earlier about evaluating law enforcement officers who testify in the course of the trial and needing to keep an open mind about what they say. I need to make sure that everyone can evaluate them impartially and not either automatically believe them or disbelieve them just because they are in law enforcement.
>
> ... are you okay with that?
>
> . . . . .
>
> Mr. Carpenter, how about you?

To which Mr. Carpenter responded affirmatively. The final question was posed to Ms. Sigrest as well, to which she responded similarly.

Because defendant has not provided us a reasonable ground to believe that Mr. Carpenter or Ms. Sigrest could not render a fair and impartial verdict, the trial judge did not abuse his discretion in retaining both as jurors. *See* Ariz. R.Crim. P. 18.4(b); *State v. Lavers*, 168 Ariz. 376, 390, 814 P.2d 333, 347 (1991).

II. SENTENCING ISSUES

Defendant claims that the death penalty was unconstitutionally applied because the state failed to prove any aggravating factors beyond a

reasonable doubt. In aggravation, the trial judge found that the murder was especially cruel, heinous and depraved. *See* A.R.S. § 13-703(F)(6). In mitigation, the judge found the following statutory and non-statutory circumstances:

> (1) Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was significantly impaired but not so impaired as to constitute a defense to prosecution.
>
> (2) Defendant comes from an abusive background, including both physical and mental abuse.
>
> (3) Defendant feels some remorse for the killing.
>
> (4) Defendant does not have prior violent convictions.
>
> (5) Defendant has had a longstanding history of alcohol and drug abuse.

Although defendant acknowledges that courts do not merely count the number of aggravating and mitigating factors, he nonetheless argues for leniency because the quantity of mitigating factors outweighs the number of aggravating factors. Defendant also claims that the mitigating factors should be given more weight. The trial judge, however, found that the mitigating circumstances were not "sufficiently substantial to outweigh the

aggravating circumstances of having committed this offense in an especially cruel, heinous or depraved manner as proved by the state and to call for leniency."

We must independently review the aggravating and mitigating circumstances to ensure that the trial court properly imposed the death penalty. *State v. Fulminante*, 161 Ariz. 237, 254, 778 P.2d 602, 619 (1988) (citations omitted), *aff'd*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

A. Aggravating Factors

1. Especially Cruel

Defendant asserts that there was insufficient evidence to find that the murder was especially cruel pursuant to A.R.S. § 13-703(F)(6). To find cruelty, the state must prove beyond a reasonable doubt that the victim consciously suffered physical pain or mental distress. *State v. Amaya-Ruiz*, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990); *Jimenez*, 165 Ariz. at 453, 799 P.2d at 794. In determining whether a murder was especially cruel, we must view the entire murder scenario, not just the final act that killed the victim. *Lavers*, 168 Ariz. at 393, 814 P.2d at 350. Having done so, we have determined that this murder was, without a doubt, especially cruel.

We find overwhelming evidence that the victim was conscious throughout much of the crime.

Witnesses testified that the victim looked terrified as defendant dragged her to the car. The pathologist testified that the victim suffered numerous cutting wounds over her hands, which are consistent with defensive-type injuries one would sustain while trying to fend off an attacker. After her throat was slit, she attempted to answer defendant's questions, but was able only to gurgle in response. The defense contends that her gurgling may have been merely reflexive breathing. However, her gurgling was heard only after questions were posed to her.

We find that the victim suffered physical pain. She suffered forty cutting and stab wounds about her face, hands, chest, neck, abdomen, and thigh. This includes a deep cutting wound that stretched across the victim's neck from ear to ear, cutting through the voice box, the esophagus, and into the cerebral column. Furthermore, she suffered blunt force injuries, including bruises on her nose, jaw, and scalp, and scraping and tearing of the lining of her mouth. She must have suffered excruciating pain before she died.

We also find that the victim suffered mental distress. Mental distress includes uncertainty as to one's ultimate fate. *State v. Lopez*, 175 Ariz. 407, 411, 857 P.2d 1261, 1265 (1993). Witnesses testified that defendant held a knife to the victim's neck, told her that he was going to kill her, and dragged her to the car. During this time, the victim had "terror" and "fear" in her eyes. Anyone in the victim's situation would have been uncertain as to

his or her ultimate fate. Thus, this murder was especially cruel.

2. Heinous and Depraved

Because the elements of A.R.S. § 13-703(F)(6) are stated in the disjunctive, our finding of cruelty is sufficient to satisfy the (F)(6) aggravating factor. Nonetheless, because defendant challenges each element and because the trial court found this to be the only aggravating factor, we address heinous and depraved as well. This court has defined "heinous" as "hatefully or shockingly evil" and "depraved" as "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977). Heinousness and depravity focus upon the "defendant's state of mind at the time of the offense, as reflected by his words and acts." *Fulminante*, 161 Ariz. at 255, 778 P.2d at 620 (citing *State v. Summerlin*, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983)).

This court has set forth specific factors which, when found, may be used to justify a trial court's finding that a murder was especially heinous or depraved. *State v. Gretzler*, 135 Ariz. 42, 51-52, 659 P.2d 1, 10-11 (1983). The factors are: (1) whether the killer relished the murder; (2) whether the killer inflicted gratuitous violence on the victim beyond that necessary to kill; (3) whether the killer needlessly mutilated the victim; (4) whether the crime was senseless; and (5) whether the victim was helpless. *Id.*; *Lopez*, 175

Ariz. at 412, 857 P.2d at 1266.

We find that the record supports the trial court's finding of heinous and depraved conduct. Defendant's statement to Charlton, "It's dead, but it's warm. Do you want a shot at it?" clearly shows that defendant relished the murder. The trial court found that this statement showed an abhorrent lack of regard for human life, and we agree. Furthermore, we find that defendant engaged in gratuitous violence beyond that necessary to cause death. *See State v. Jones*, 185 Ariz. 471, 488, 917 P.2d 200, 217 (1996). Of the forty cutting and stab wounds, only three were potentially fatal. The other thirty-seven sharp-force injuries and the countless bruises were unnecessary and excessive.

We also find that the victim was helpless. Defendant held a knife to the victim's throat and forced her into the car. She was unarmed and partially clothed, with no means of escape. In the car, defendant was on top of her, abusing and stabbing her. The victim was unable to resist defendant's attack.

Finally, the murder was senseless. A murder is senseless when it is unnecessary to achieve the killer's goal. *State v. Ross*, 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994). Defendant's apparent goal was to be paid back for the money he wasted on the bad drugs. Killing the victim was unnecessary to accomplish this goal and in fact, ensured that he would neither be paid back, nor find out the identity of the drug dealer. In total, the record

overwhelmingly supports a finding of heinous and depraved conduct.

B. Mitigating Factors

Defendant contends that the disparity between Charlton's ten-and-one-half-year jail sentence for kidnapping and defendant's death penalty sentence for murder constitutes a mitigating factor. However, when the disparity between co-defendants' sentences results from an appropriate plea agreement with one of the defendants, the disparity is not considered a mitigating factor. *State v. Stokley*, 182 Ariz. 505, 523, 898 P.2d 454, 472 (1995), *cert. denied*, 516 U.S. 1078, 116 S.Ct. 787, 133 L.Ed.2d 737 (1996). Mere disparity between two sentences is not significant, "but, rather, unexplained disparity." *State v. Schurz*, 176 Ariz. 46, 57, 859 P.2d 156, 167 (1993). Moreover, if the murder is found to be especially cruel, heinous, or depraved, "even unexplained disparity has little significance." *Id.* In the present case, Charlton received a lesser sentence in part because he entered into a plea agreement by which he pled guilty to kidnapping and was required to give truthful testimony against defendant. More significantly, Charlton was much less culpable than defendant as shown by the facts cited above. As a result, the disparity in sentencing is explainable and understandable. The trial judge properly disregarded the disparate sentences as a mitigating factor.

C. Balancing the Aggravating/Mitigating Factors

Defendant argues that the trial judge's finding of only one aggravating factor and significant mitigating evidence raises a question as to whether this crime warrants the death penalty. *See* *State v. Rockwell*, 161 Ariz. 5, 16, 775 P.2d 1069, 1080 (1989). In the instant case, defendant's mitigating evidence is less significant than it initially might seem. Although defendant expressed some remorse for the victim's death, he claims that he was not responsible. Although the trial judge found that defendant's alcoholic state significantly impaired him, the judge noted that defendant was cognizant of his surroundings and was capable of carrying on conversations with Charlton and the victim. Furthermore, the evidence supporting the aggravating factor was substantial and horrific. We have reviewed all of the trial court's findings on mitigation and, when balanced against the circumstances constituting the sole aggravating factor, the mitigating evidence is insufficient to warrant leniency.

DISPOSITION

We have reviewed and considered all of defendant's claims of error. In light of defendant's death sentence, we have independently reviewed and reweighed the aggravating and mitigating circumstances. Having done so, we concur with the trial court's findings and affirm defendant's convictions and sentences.

ZLAKET, C.J., JONES, V.C.J., and FELDMAN and MARTONE, JJ., concur.

Ariz.,1997.
State v. Detrich
188 Ariz. 57, 932 P.2d 1328

APPENDIX B

Supreme Court of the United States

David Scott **DETRICH**, petitioner,
v.
ARIZONA.

No. 97-5161
Oct. 6, 1997

Case below, 178 Ariz. 380, 873 P.2d 1302; 188 Ariz. 57, 932 P.2d 1328.

Petition for writ of certiorari to the Supreme Court of Arizona denied.

U.S., 1997
Detrich v. Arizona
522 U.S. 879, 118 S.Ct. 202, 139 L.Ed.2d 139, 66 USLW 3260

APPENDIX C

FILED
6-17-02
PATRICIA A. NOLAND, Clerk
s/ _____
Deputy

ARIZONA SUPERIOR COURT
COUNTY OF PIMA

STATE OF ARIZONA,	)	CR-29267
	)	
PLAINTIFF,	)	ORDER
	)	
-vs-	)	
	)	
DAVID SCOTT DETRICH,	)	The Hon. Richard
	)	Nichols
DEFENDANT.	)	
	)	

After reviewing the Petition for Post-Conviction Relief, the Response, Reply, Supplemental Response, Reply to Supplemental Response, Supplemental Petition and Supplemental Response, all exhibits and attachments, and after considering the oral arguments of the parties, IT IS ORDERED:

1. Petitioner has not presented a colorable claim that trial counsel was constitutionally deficient in failing to retain an expert to examine the forensic evidence at trial. Examination of the seat covers and the car involved in the incident by an expert could not reasonably be expected to yield relevant and/or exculpatory evidence that was not available from

other sources, such as witness testimony. Moreover, Petitioner conceded that trial counsel was not ineffective in failing to conduct DNA testing of blood on the victim's fingernail, after such testing revealed that the blood belonged to the victim and, therefore, was not exculpatory. For the same reason, Petitioner's claim that the DNA evidence constituted newly-discovered evidence is unavailing. This claim is summarily dismissed.

2. Petitioner did not present a colorable claim that his trial counsel was ineffective in failing to present live testimony from William Schell in the second trial, in lieu of Schell's recorded testimony from the first trial. This speculative claim is summarily dismissed because Petitioner presented no legal authority to support it. Moreover, Petitioner failed to demonstrate that admission of the previously-reported trial testimony prejudiced him, given the overwhelming evidence of Petitioner's guilt and the fact that the first jury convicted him, despite its opportunity to hear Schell's live testimony.

3. Petitioner has not presented a colorable claim that his trial counsel was ineffective in failing to object to testimony that Alan Charlton's plea agreement required that he testify truthfully, where such an objection to the contested provision would have been overruled. Such testimony did not constitute "vouching" under state law, Petitioner had the opportunity to cross-examine Charlton to attack his credibility, and the jurors were instructed to consider any motive or prejudice that any witness may have had. Therefore, this claim is summarily dismissed.

4. Petitioner failed to present a colorable claim that his trial counsel was ineffective in failing to retain an expert to rebut the State pathologist's testimony that the victim could have made "gurgling" sounds in response to questioning by Petitioner, after sustaining knife wounds to her throat. Contrary to an affidavit submitted by Petitioner, there was no testimony that the victim "engaged in conversation" or was conscious for a long period of time. The victim sustained four serious wounds to the neck, and it is merely speculative to assume that the victim's attempt to respond occurred after the most serious wound. No prejudice accrued to Petitioner, in any event, because evidence other than Charlton's testimony regarding the "gurgling" sounds independently supported a finding of cruelty at sentencing. Petitioner's claim that expert rebuttal testimony would have discredited Charlton's testimony supported the finding that Petitioner committed the murder. This claim is summarily dismissed.

5. Petitioner failed to present a colorable claim that trial counsel was ineffective in failing to preserve certain claims of federal constitutional error:

    a. Petitioner failed to meet his burden of demonstrating that, but for trial counsel's failure to question jurors regarding racial prejudice, there was a reasonable probability that he would have been acquitted. The record does not contain any information on the racial composition of Petitioner's jury panel or any evidence of racial bias against Petitioner, who is white, because the victim was black. This

speculative allegation of ineffective assistance of counsel, unsupported legally or factually, is summarily dismissed.

b. Trial counsel was not ineffective for failing to object to removal of jurors for cause who unequivocally expressed doubt that their views agains the death penalty would permit them to decide the case on the merits. The jury panel was properly "death qualified," and no colorable claim for relief has been raised in this regard. This claim is summarily dismissed.

c. Trial counsel was not ineffective for failing to object to the denial of counsel's requests to remove unspecified jurors for caused, where, at counsel's request, the trial court further questioned jurors whose initial answers to questions did not clearly indicate they would be fair and impartial. Moreover, the defense counsel passed the panel with the objections previously noted, thereby preserving the issue for appeal. However, Petitioner is now precluded from raising this issue in his post-conviction relief proceedings because he failed to raise it on direct appeal. Ariz. R. Crim. P. 32.2(a)(3). This claim is summarily dismissed.

d. Trial counsel was not ineffective in failing to object on Eighth Amendment grounds to the trial court's Enmund-Tison finding that Petitioner actually killed the victim, given the evidence adduced at trial, as well as the implicit finding by the Arizona Supreme Court that Petitioner was eligible for the death penalty

because he actually committed the murder. This claim is summarily dismissed.

c. Trial counsel was not ineffective in failing to object to the lack of a unanimous finding of premeditation by the jury, where Petitioner was eligible for the death sentence under the theory of felony murder as a major participant in the underlying felony, who exhibited a reckless indifference to human life. Thus, as a matter of law, this claim must fail and is summarily dismissed.

6. Petitioner has not presented a colorable claim that appellate counsel was ineffective in failing to raise the same five state or federal claims enumerated in Claim No. 5, supra. First appellate counsel did raise the first two of the five issues that Petitioner asserts were not raised on appeal. Second, the other issues were waived at the trial court level, rendering appellate review unavailable absent fundamental error. Petitioner has neither argued nor established fundamental error in this regard. In sum, Petitioner has not shown that, but for appellate counsel's unprofessional errors, the outcome of the appeal would have been different. This claim is summarily dismissed.

7. Petitioner has not presented a colorable claim that trial counsel was ineffective at the sentencing stage of the proceedings for failing to have Dr. Briggs, a neuropsychologist, testify on Petitioner's behalf, or to present additional evidence of Petitioner's abusive background. After considering the initial psychological report, the presentence report, a

sentencing memorandum, and written statements from Petitioner's sister citing multiple examples of both physical and mental abuse suffered by Petitioner as a child, this Court found statutory and non-statutory mitigating circumstances. Dr. Briggs' report was not significantly different from the report considered by this Court. Indeed, Dr. Briggs found that Petitioner's general neuropsychological functioning was normal and showed an absence of cognitive dysfunction. Therefore, there is no reasonable probability that this testimony would have compelled this Court to impose a sentence less than death. Moreover, additional evidence of Petitioner's dysfunctional childhood would have been merely cumulative and was not "newly discovered." This claim is summarily dismissed.

8. This Court declines to grant relief on Petitioner's claim, based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), that he is entitled to a jury determination of aggravation, mitigation, and sentence as a new rule of law. Unless and until the United States Supreme Court overrules *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), and thereby invalidates state capital sentencing schemes permitting judges, rather than juries, to find specific aggravating factors before imposing a sentence of death, the law in Arizona is otherwise. This claim is summarily dismissed.

9. Petitioner is not entitled to raise his own claims of ineffective assistance of counsel because he is currently represented by counsel. Even if Petitioner were so entitled, given the lack of evidence, argument, and citation to authority, the claims that

Petitioner has attempted to raise are not sufficiently presented to this Court in this proceeding and are, therefore, summarily dismissed.

THE COURT FINDS that Petitioner has not raised a colorable claim for relief in any of the assertions enumerated above. Moreover, the Court finds that neither prong of the *Strickland v. Washington* test has been met as to any claims of ineffective assistance of counsel.

THE COURT FINDS that no purpose would be served by holding an evidentiary hearing on any claim presented by Petitioner.

IT IS ORDERED that the Petition for Post-Conviction Relief is dismissed.

DATED this 3d day of June, 2002.

s/_____
The Hon. Richard Nichols

Cc: J. Conrad Parau, Esq. 405 N. Kendrick, Suite 1, P.O. Box D, Flagstaff, Az 86107

Jonathan Bass, Esq.

Attorney General – Tucson – Donna Lam

APPENDIX D

RECEIVED
APR 24 2003

Supreme Court

OEL K. DESSAINT
LERK OF COURT

STATE OF ARIZONA

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

April 23, 2003

RE: STATE OF ARIZONA v DAVID SCOTT DETRICH
Arizona Supreme Court No. CR-02-0244-PC
Pima County Superior Court No. CR-29267

GREETNGS:

The following action was taken by the Supreme Court of the State of Arizona on April 22, 2003, in regard to the above-referenced cause:

ORDERED: Petition for Review [on Denial of Post-Conviction Relief] = DENIED.

FURTHER ORDERED: A warrant of execution shall be issued forthwith.

Noel K Dessaint, Clerk

TO:

Hon Terry Goddard, Arizona Attorney General
Attn: Kent E Cattani, Esq

Donna J Lam, Assistant Arizona Attorney General, Tucson

J Conrad Baran, Esq

David Scott Detrich, ADOC #83703, Arizona State Prison, Florence – Eyman Complex–SMU #2 Unit

Hon Richard D Nichols, Pima County Superior Court

Hon Edgar B Acuna, Criminal Presiding Judge, Pima County Superior Court

Hon John S Leonardo, Presiding Judge, Pima County Superior Court

Patricia A Noland, Clerk, Pima County Superior Court

Jennifer Bedier, Arizona Capital Representation Project [Information Copy Only]

Jonathan Bass, Arizona Death Penalty Judicial Assistance Program, Southern Counties [Information Copy Only]

kab

GJK/JB-13360

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Scott Detrich,	)	No. CV-03-229-TUC-DCB
	)	
Petitioner,	)	DEATH PENALTY CASE
	)	
vs.	)	
	)	
Dora Schriro, et al.,	)	MEMORANDUM OF
	)	DECISION AND ORDER
Respondents.	)	
	)	

Petitioner David Scott Detrich is a state prisoner who filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. Seven claims remain pending, and the Court reviews them on the merits in this Order. For the reasons set forth herein, the Court concludes that Petitioner is not entitled to relief.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of November 4, 1989, in Benson, Arizona, Petitioner and his codefendant Alan Charlton each consumed twelve to twenty-four beers in approximately two hours.[1] After driving to Tucson and

[1] Except where otherwise indicated, this factual summary is taken from the Arizona Supreme Court opinion upholding Petitioner's (Continued)

consuming more beer, they picked up the victim, Elizabeth Souter, on the side of the road. After obtaining some cocaine and going to the victim's house, Petitioner accused her of providing him bad drugs. Petitioner sat down with the victim and was bothering her while she tried to sleep; he told her she was going to pay for giving him bad drugs and that she was going to have sex with him. (RT 12/14/94 at 30-33, 80-81.) Petitioner held a knife to her throat and threatened to kill her. The two men took the victim to the car at knife point.

Charlton drove, Petitioner sat in the middle, and the victim sat up against the passenger door. Charlton testified that he saw Petitioner humping the victim and asking her if she liked it. Charlton subsequently looked and saw that the victim's throat was slit. Charlton indicated that Petitioner then hit the victim and asked her three times from whom she got the drugs. The victim gurgled in response each time. Charlton attested he never saw any stabbing, but he was poked in the arm with the knife three or four times. The pathologist established that the victim was stabbed forty times and her throat was slit. Charlton declined when Petitioner asked, "It's dead but it's warm. Do you want a shot at it?" Petitioner dragged the victim's body into a remote area of the desert.

A friend of Petitioner and Charlton's, William Carbonell, testified that the two men showed up at his house at 4:00 a.m. Carbonell testified that Petitioner

(Continued).

convictions and sentence. *See State v. Detrich*, 188 Ariz. 57, 60-61, 932 P.2d 1328, 1331-32.

was covered in blood and that Charlton had blood on his right side. Petitioner confessed to Carbonell that he had killed a girl by slitting her throat, after forcing her into the car at knife point. He stated that he killed the victim because the drugs she had purchased were bad. Petitioner was arrested in New Mexico approximately two weeks later. Charlton pled guilty to kidnapping and agreed to testify in exchange for a dismissal of the murder charge; he was sentenced to ten and one-half years in prison.

On November 2, 1990, Petitioner was convicted by a jury of kidnapping, sexual abuse, and first degree murder. Pima County Superior Court Judge Michael D. Alfred sentenced Petitioner to death for the murder and to a term of years for the other counts. The Arizona Supreme Court affirmed the sexual abuse conviction but reversed Petitioner's convictions for kidnapping and first degree murder. *State v. Detrich*, 178 Ariz. 380, 873 P.2d 1302 (1994) (*Detrich I*). Petitioner was re-tried and, on December 20, 1994, was again convicted by a jury of kidnapping and first degree murder. After finding one aggravating factor, Pima County Superior Court Judge Richard D. Nichols sentenced Petitioner to death for the murder and to a term of years for kidnapping. On appeal, the Arizona Supreme Court affirmed Petitioner's convictions and sentences. *See State v. Detrich*, 188 Ariz. 57, 932 P.2d 1328 (1997) (*Detrich II*).

Petitioner filed a Petition for Writ of Habeas Corpus in this Court on April 29, 2003. (Dkt. 1.) Petitioner's Amended Petition, filed on April 15, 2004, raised eighteen claims, and the parties briefed the

procedural status and merits of those claims. (Dkts. 31, 61, 75.) After Petitioner's motions for evidentiary development were fully briefed (Dkts. 81, 82, 83, 86, 87, 90), the Court denied development and dismissed eleven of the claims based on a procedural bar or the merits. (Dkts. 93, 105.) The Court granted an evidentiary hearing as to Claim B (Dkt. 105), which was held in April and May, 2007.

LEGAL STANDARD FOR RELIEF UNDER THE AEDPA

The Antiterrorism and Effective Death Penalty Act (AEDPA) established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings'. . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 127 S. Ct. 649, 653 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Musladin*, 127 S. Ct. at 654; *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state

court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406; *see Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent

"unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Landrigan*, 127 S. Ct. at 1939; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Landrigan*, 127 S. Ct. at 1939-40; *Miller-El II*, 545 U.S. at 240.

DISCUSSION OF CLAIM B

Petitioner alleges that his counsel failed to adequately investigate and present mitigation at sentencing. If counsel had conducted a sufficient investigation and presented additional evidence of Petitioner's childhood abuse and neglect, post-traumatic stress disorder (PTSD), history of and genetic propensity for substance abuse, developmental and neurological issues, familial love, and adaptation

to prison, he alleges there is a reasonable probability he would not have been sentenced to death. The Court held a four-day evidentiary hearing on Claim B (Dkts. 239, 241, 242, 246), and the parties filed post-hearing briefs (Dkts. 258, 259). In resolving this claim, the Court has reviewed and considered all of the evidence presented in state court and in these proceedings, whether given by way of in-person testimony or in written form.

Clearly Established Supreme Court Law

To prevail on a claim of ineffective assistance of counsel (IAC), a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all of the circumstances. *Id.* at 688-89. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689.

A petitioner must affirmatively prove prejudice. *Id.* at 693. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The *Strickland*

Court explained that "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In *Wiggins v. Smith*, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. 510, 534 (2003); *see also Mayfield v. Woodford*, 270 F.3d 915, 928 (9th Cir. 2001) (en banc). The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced" in subsequent proceedings. *Wiggins*, 539 U.S. at 536 (quoting *Williams v. Taylor*, 529 U.S. at 397-98).

In order to assess and reweigh the aggravation and mitigation, this Court must consider the relevant provisions of Arizona's death penalty statute at the time Petitioner was sentenced: mitigating circumstances are any factors "relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense"; mitigation evidence can be presented regardless of admissibility and need only be proven by a preponderance; the burden is on the defendant to prove mitigation; the court shall impose a sentence of death if it finds at least one aggravating circumstance and "that there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(C), (E), (G) (West 1994).

The Arizona courts assess whether mitigating factors are proven and consider "the quality and strength of those factors." *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006). Mitigating evidence must be considered regardless of whether there is a "nexus" between the mitigating factor and the crime, but the lack of a causal connection may be considered in assessing the weight of the evidence. *Id.*; *State v. Hampton*, 213 Ariz. 167, 185, 140 P.3d 950, 968 (2006) (finding horrendous childhood less weighty and not sufficiently substantial to call for leniency, in part, because not tied to the offense). When the experts indicate that a defendant "knew right from wrong and could not establish a causal nexus between the mitigating factors and [the] crime," the Arizona courts may afford evidence of abusive childhood, personality disorders, and substance abuse limited value. *State v. Johnson*, 212 Ariz. 425, 440, 133 P.3d 735, 750 (2006).

Background

In sentencing Petitioner to death after his first trial, Judge Alfred found that the crime was especially cruel, heinous, and depraved and that there were no mitigating circumstances. Petitioner was appointed new counsel, Harold Higgins, for his retrial.

Counsel's Mitigation Presentation

After the second trial, Higgins submitted a sentencing memorandum which listed the following mitigating factors: (1) high level of intoxication at the time of the crime due to alcohol and possibly cocaine, and a history of alcohol abuse encouraged by his

parents; (2) abusive background; (3) lack of prior convictions involving serious injury; (4) remorse; and (5) minimal sentence received by co-defendant. (Pet. Ex. 73 at 3.)[2] Attached to the memorandum was a statement by Diana Jo Stevens, Petitioner's sister. Stevens's letter focused on Petitioner's lifelong history of drug and alcohol use, beginning by age thirteen, which was encouraged by his stepfather. (Pet. Ex. 73 at 4-6; Pet. Ex. 24.) Counsel submitted a supplemental sentencing memorandum alleging Petitioner's abusive childhood as an additional mitigating factor, again supported by a statement from Stevens. (Pet. Ex. 75.) Stevens described the constant and severe physical and verbal abuse Petitioner suffered from the ages of eight to thirteen at the hands of his stepmother. (Pet. Ex. 75 at 2-11; Pet. Ex. 25.)

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[2] "Pet. Ex." refers to Petitioner's exhibits submitted for the evidentiary hearing in this Court (Respondents did not submit a separate set of exhibits); the exhibit list is Dkt. 249. "RT" refers to the reporter's transcripts from Petitioner's state court proceedings and federal habeas proceedings. "ROA-I" refers to the three-volume record on appeal from trial and sentencing prepared for Petitioner's first direct appeal to the Arizona Supreme Court (Case No. CR-91-0071-AP). "ROA-II" refers to the two-volume record on appeal from retrial and sentencing prepared for Petitioner's second direct appeal to the Arizona Supreme Court (Case No. 95-0085-AP). "ROA-PCR Doc." refers to the docket of the two-volume record on appeal from post-conviction proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-02-0244-PC). The state court original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court on January 21, 2005. (Dkt. 91.)

Counsel did not present any live mitigation witnesses. (RT 2/6/95.) Based on the trial testimony, the presentence report (PSR), a 1991 psychological evaluation requested by original trial counsel, and information from Petitioner's sister, trial counsel argued that Petitioner's capacity to appreciate the wrongfulness of his conduct was impaired by large quantities of alcohol and possibly cocaine at the time of the crime; Petitioner had a longstanding history of alcohol abuse starting at a very early age and encouraged by his parents; he suffered childhood physical and mental abuse; he had no prior convictions for violent crimes; he was remorseful; his co-defendant received a minimal sentence without a significant difference in criminal participation; and he had a role as a father to his son. (*Id.* at 34-38.)

Presentence Report: December 1990 original report, February 1995 report addendum, 1985 and 1991 mental health evaluations

The PSR recounted much of Petitioner's history: Petitioner was born with a cleft palate which was surgically corrected; he had an unstable childhood and was abused and neglected by his stepmother; there was a lengthy custody battle between his parents; his mother was a prescription drug abuser; he first used alcohol and began experimenting with drugs around age nine; he moved out around age fourteen; he went AWOL from the Army when his brother died; he had a turbulent marriage to his brother's widow, during which he had some criminal involvement and eventual placement in a state hospital for substance abuse; and

he suffered from severe alcoholism and was a drug abuser. (Pet. Ex. 71.)

1985 psychological & psychiatric reports[3]

Psychologist Larry Zimmerman administered the Shipley Hartford, Sentence Completion, and the MMPI tests. Based on his clinical interview of Petitioner he recounted significant portions of Petitoner's history including his turbulent abusive childhood, his history of substance abuse, and that he attempted suicide shortly before his 1985 incarceration. Dr. Zimmerman assessed that Petitioner's intelligence was normal or average as was his conceptual problem-solving; however, he found Petitioner to be immature, irresponsible, impulsive, and at risk of acting with poor judgment or planning. (Pet. Ex. 60.) Psychiatrist Thomas Newberry also recounted some of Petitioner's background, including his unstable childhood, the significant abuse and neglect to which he was subjected, his substance use beginning at an early age, and depression including a suicide attempt shortly before being incarcerated. The psychiatric report concluded that Petitioner's intelligence was above average and there was no evidence of psychotic processes; however, he found Petitioner to be occasionally impulsive, easily frustrated, and self-destructive. (Pet. Ex. 61.)

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[3] These evaluations were conducted at the Kansas State Reception and Diagnostic Center while Petitioner was incarcerated on a conviction for giving worthless checks; they were attached to the PSR.

1991 psychological evaluation

Petitioner was referred by the probation department for evaluation by the court clinic, at the request of his original trial counsel. Psychologist Catherine Boyer administered the Rotter Incomplete Sentences Blank-Adult Form and the MMPI-2 tests. Dr. Boyer gathered and recounted significant background information about Petitioner including his erratic childhood; the severe physical abuse and neglect he suffered and domestic violence he witnessed; his long history of alcohol and drug use as well as familial substance abuse; the frequent alcoholic blackouts in his past and at the time of the crime; and a 1983 suicide attempt.[4] (Pet. Ex. 58.) Dr. Boyer found no evidence of significant psychiatric problems or major mental disorders. She assessed that Petitioner was emotionally impaired and displayed "oppositional tendencies, nonconformity, conflict with authority and antisocial attitudes, beliefs and/or behaviors." (Pet. Ex. 58 at 9.) She summarized her diagnostic impressions as: "Probable Antisocial Personality Disorder"; "Alcohol Abuse [and Polysubstance Abuse], currently in remission due to incarceration." (Pet. Ex. 58 at 10.)

Sentencing Pronouncement

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[4] Petitioner indicated to Dr. Boyer that he had attempted suicide only one time, and she reported the date as 1983 (Pet. Ex. 58 at 3); however, the 1985 evaluations indicate a singular attempt in 1985 (Pet. Ex. 60 at 1; Pet. Ex. 61 at 5).

Judge Nichols found several mitigating factors. (Pet. Ex. 70 at 7-9.) First, he found, under A.R.S. § 13-703(G)(1), that Petitioner's capacity to appreciate the wrongfulness of his conduct or conform it to the law was significantly impaired, based on the testimony that Petitioner was drinking heavily and possibly using cocaine at the time of the crime. (*Id.* at 7-8.) Second, he found the following non-statutory mitigation: physically and mentally abusive background; remorse; and history of alcohol and drug abuse. (*Id.* at 8-9.) The judge determined that the mitigation did not outweigh the one aggravating factor – that the crime was especially cruel, heinous and depraved – under A.R.S. § 13-703(F)(6). (*Id.* at 9.)

Appeal

The Arizona Supreme Court independently reviewed the record and upheld the (F)(6) aggravating factor. Specifically, the court found that the murder was cruel because the victim suffered physical pain and mental distress, and that it was heinous/depraved because Petitioner relished the murder, he engaged in gratuitous violence, the victim was helpless, and the murder was senseless. *Detrich II*, 188 Ariz. at 67-68, 932 P.2d at 1338-39. The supreme court did not discuss independently each mitigating factor found by the sentencing court, but determined that when the mitigation was balanced against the circumstances of the singular aggravating factor – the evidence in support of which was substantial and horrific – it was not sufficient to warrant leniency. *Id.* at 69, 932 P.2d at 1340.

Post-conviction Proceeding

Petitioner raised this IAC-at-sentencing claim in his petition for post-conviction relief (PCR), which he supported with several documents. (ROA-PCR Doc. 13.) James Williams, the investigator hired by Petitioner's attorney, attested in an affidavit that he did not conduct any investigation into mitigation or Petitioner's life history and family background. (Pet. Ex. 4.) Petitioner's mother, sister, and stepfather confirmed in written statements Petitioner's history of being abused and abusing alcohol and drugs, provided additional details, and added some new facts not specifically known before regarding Petitioner's separation from his mother as a newborn, the head injuries he suffered, and his personality changes due to the abuse he suffered. (Pet. Exs. 27, 33, 39.)

Petitioner requested and received a neuropsychological evaluation from Dr. Robert Briggs. (Pet. Ex. 22.) Dr. Briggs gathered information from PCR counsel, interviewed Petitioner, and reviewed statements by Petitioner's family members and a 1986 Larned State Hospital psychological evaluation. (*Id.* at 1.) He administered the following tests: Halstead-Reitan Neuropsychological Battery (including the Halstead Neuropsychological Test Batteryfor Adults, Trail Making Test, parts A and B, Reitan-Klove Lateral Dominance Examination, Reitan-Indiana Aphasia Screening Examination, and Reitan-Klove Sensory-Perceptual Examination); Memory Assessment Scales; WAIS; Wide Range Achievement

Test – 3rd edition; and MMPI-2. (*Id.*) Petitioner's IQ was in the high average range and his academic abilities were within expectations based on his education and intelligence. (*Id.* at 2.) He found that Petitioner tended to be hostile, very impulsive, blamed others for his difficulties, and might be aggressive. Further, he identified Petitioner as immature, alienated, manipulative, self-indulgent, and narcissistic. (*Id.* at 3.) Dr. Briggs assessed Petitioner's neuropsychological functioning as normal (with no pattern of cognitive dysfunction); Petitioner had some impaired performances in testing which were not of major clinical significance. (*Id.* at 2, 6.) Dr. Briggs thought it was possible that Petitioner had an antisocial or paranoid personality disorder. He concluded there was likely an interaction between Petitioner's emotional status, which the doctor thought had the greatest impact on his functioning, and his mild neuropsychological deficits, causing greater impairment. (*Id.* at 6.) Finally, he concluded that Petitioner's decision-making when affected by alcohol was instinctual and not based on reason. (*Id.* at 6-7.)

The PCR court denied the claim, finding that:

> Petitioner has not presented a colorable claim that trial counsel was ineffective at the sentencing stage of the proceedings for failing to have Dr. Briggs, a neuropsychologist, testify on Petitioner's behalf, or to present additional evidence of Petitioner's abusive background. After considering the initial psychological report, the presentence report, a sentencing memorandum, and written statements from

> Petitioner's sister citing multiple examples of both physical and mental abuse suffered by Petitioner as a child, this Court found statutory and non-statutory mitigating circumstances. Dr. Briggs' report was not significantly different from the report considered by this Court. Indeed, Dr. Briggs found that Petitioner's general neuropsychological functioning was normal and showed an absence of cognitive dysfunction. Therefore, there is no reasonable probability that this testimony would have compelled this Court to impose a sentence less than death. Moreover, additional evidence of Petitioner's dysfunctional childhood would have been merely cumulative and was not "newly discovered." This claim is summarily dismissed.

(ROA-PCR Doc. 69 at 3.)

Performance Analysis

The Court must assess whether counsel's investigation and presentation of mitigation was reasonable under all the circumstances. *Strickland*, 466 U.S. at 688-89.

Facts

At the habeas evidentiary hearing, neither party presented any in-court evidence regarding sentencing counsel's performance; however, Petitioner presented relevant documents in lieu of live testimony. James Glanville, Petitioner's attorney at his first trial and sentencing, submitted a declaration stating that he did

no investigation or presentation of mitigation and did not obtain any expert assistance. (Pet. Ex. 3.) Harold Higgins, Petitioner's counsel at his second sentencing, submitted a declaration stating that he was aware Petitioner had been convicted and sentenced to death previously for the crime, and that the judge had found no mitigating factors. (Pet. Ex. 1 at 1.) He knew that attorney Glanville was rumored to have been a substance abuser around the time of Petitioner's first trial, and he attests that Glanville's investigation file from the case was minimal. (*Id.* at 2.) Higgins does not recall asking his investigator, James Williams, to investigate mitigation, outside of possibly making a few unsuccessful calls to family members, nor does he think Williams was qualified to do such investigation. (*Id.* at 2; Pet. Ex. 5 at 12.) Williams attests that he did not investigate any possible psychological or psychiatric issues, nor any life history or family background of Petitioner for purposes of mitigation. (Pet. Ex. 4; Pet. Ex. 5 at 19.) Higgins did not hire a specialized mitigation investigator, did not request any mental health experts, and does not recall talking to Petitioner's sister, Diana Jo Stevens. Although he was aware of Petitioner's cleft palate, he did not investigate whether it was related to any mental health issues. (Pet. Ex. 1 at 2.) Higgins states that Petitioner's case was his second capital case and, at that time, he had not attended any specialized trainings about the penalty phase of a capital case; he asserts that he did not make a strategic decision not to investigate or present available mitigation, and if he had known the information about Petitioner's background that he has learned since he would have presented it. (*Id.* at 3.) Finally, Higgins avows that his billing records

accurately reflect the time he spent on the case. (*Id.* at 1.)

Philip Maloney, the supervising attorney for the Pima County Office of Contract Counsel, submitted a declaration based on his review of the billing records in Petitioner's case. (Pet. Ex. 7.) Higgins was paid $525, equivalent to approximately 10 hours of work, for the penalty phase of Petitioner's case; investigator James Williams submitted his final bill on January 11, 1995, and was paid a total of $1136.79, including expenses and costs. (*Id.* at 1.)

Analysis

Counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary. *Strickland*, 466 U.S. at 690. The failure to adequately investigate and present mitigating evidence can constitute deficient performance. *See Wiggins*, 539 U.S. at 522. A reasonable mitigation investigation involves not only the search for good character evidence but also evidence that may demonstrate that the criminal act was "attributable to a disadvantaged background or to emotional and mental problems." *See Boyde v. California*, 494 U.S. 370, 382 (1990). Because the PCR court did not address this prong of the *Strickland* analysis, the Court reviews this portion of the claim *de novo*. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Contrary to Respondents' argument, it was not reasonable for Higgins to rely primarily on information presented in the first sentencing because in that

proceeding the judge did not find any specific mitigating factors and sentenced Petitioner to death. Further, Petitioner's original trial counsel did not file a written memorandum regarding mitigation (ROA-I 237-54), nor did he present any evidence at the mitigation hearing, relying solely on the trial record and the PSR to make his limited mitigation arguments (RT 2/4/91). Thus, it does not appear there was any investigation upon which subsequent counsel could have relied.

Both Higgins and his investigator attested that the investigator did not conduct any mitigation investigation (Pet. Ex. 4; Pet. Ex. 1 at 2), although they both recollect that the investigator made some unsuccessful efforts to contact members of Petitioner's family (Pet. Ex. 1 at 2; Pet. Ex. 5 at 12; Pet. Ex. 19). Counsel further attests that he did not conduct any mitigation investigation; however, it is clear from the record that someone had contact with Petitioner's sister, and counsel submitted evidence from her. Contact with Petitioner's sister and review of the PSR is the only investigation that appears to have been conducted in the ten hours spent preparing for sentencing. Higgins avowed that he did not make a strategic decision to not investigate or present any available mitigation. (Pet. Ex. 1 at 3.) Respondents have not argued there was a strategic reason for counsel to have foregone investigation and presentation of mitigation, and the Court is not aware of any such strategic basis.

Higgins was on notice that Petitioner was born with a cleft palate, had been severely abused as a

child, had a history of alcohol and drug abuse beginning at a young age, had attempted suicide in the past, and was described by mental health professionals as impulsive and as a person who acts with poor judgment and in self-destructive ways. Yet, he did no further investigation. It was unreasonable for counsel to "abandon [his] investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. Counsel failed to contact additional family members for background and positive character trait information, investigate Petitioner's suicide attempts, discover that Petitioner was exposed to alcohol in utero, or obtain a neuropsychological evaluation.

Deficient performance is established where trial counsel failed to investigate and present substantial mitigating evidence regarding family background, mental health issues, and positive character traits when potential rebuttal evidence was minimal. *See Williams v. Taylor*, 529 U.S. at 395-96. In light of the evidence before the Court establishing counsel's failure to conduct any meaningful investigation, the Court finds that counsel's performance was unreasonable and that Petitioner has satisfied the performance prong of the *Strickland* analysis. *See Correll v. Ryan*, 465 F.3d 1006, 1011-12 (9th Cir. 2006) (finding that failure to investigate and present classic mitigation evidence of which counsel was aware and to rely on the presentence report was deficient); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001); *Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995) (finding

counsel's performance unreasonable when there was no tactical reason to not put on available mitigation).

Prejudice Analysis

The Court now assesses whether there is a reasonable probability that, if counsel had investigated and presented the available mitigation evidence, Petitioner would not have been sentenced to death. *See Strickland*, 466 U.S. at 693.

Childhood abuse

At the time of sentencing, Petitioner's counsel submitted a six-page letter from Petitioner's sister discussing Petitioner's turbulent childhood and the abuse he suffered. (Pet. Ex. 25.) Stevens stated that their parents divorced when Petitioner was 6, and they moved from Ohio to Kansas with their mother and saw little of their father. Two years later, their father refused to return the four children after a visit and they lived with him and their stepmother for the next five years, although their father was rarely home. In public, their stepmother acted as if she was a great mother and would pretend to be their biological mother. At home, their stepmother let them know she hated them and did not want them around. She was constantly physically and verbally abusive: slapping one or more of the children across the face daily; spanking Petitioner with a belt when he wet the bed, requiring him to wash the soiled sheets before school, and humiliating him in front of other kids; preventing them from being alone with their dad; and constantly issuing threats that they believed and feared. Their

stepmother pushed their older twelve-year-old brother down a set of concrete stairs causing severe bruising, threatened them all with a gun if they told their dad what had happened, and kept their brother inside for days until the bruises on his face faded. One time as punishment she took Petitioner outside and tied him to a post with a rope around his neck telling him he was no better than a dog. Stevens emphasized that the abuse by their stepmother was constant and they were reminded daily that she did not want them around. After five years, their mother, using their letters and statements about the abuse, won custody of the children.

After returning to his mother's custody, at the age of thirteen, Petitioner spent most of his time with his stepfather, who encouraged him to drink beer and whiskey. Petitioner also began using marijuana and speed. Petitioner's drinking, primarily with his stepfather, increased over the next few years and included frequent all-night parties and guzzling whiskey. His mother and stepfather's marriage was turbulent, and Petitioner avoided the house because his stepfather was physically and verbally abusive to his mother.

The PSR and attached mental health evaluations recounted Petitioner's unstable childhood, that his parents divorced and his family moved a lot, he was abused and neglected by his stepmother, there was a lengthy custody battle between his parents, he had a poor relationship with his mother who was a prescription drug abuser, his alcohol and drug use began at the age of ten, he had a history of constant

drug use, and Petitioner was rarely home after the age of fourteen (Pet. Exs. 71, 60, 61.) The 1991 psychological evaluation reiterated much of the same background and noted an incident in which Petitioner's stepmother held him down under the water in the bath. Additionally, Petitioner reported to Dr. Boyer in 1991 that his mother was an uninvolved, uncaring parent; that his stepfather was an alcoholic who taught him to drink, saw other women, and was physically abusive to his mother; and that Petitioner had little structure, supervision, or discipline when living with them. (Pet. Ex.58.)

Some limited additional information about Petitioner's childhood was developed in the PCR proceedings. Petitioner's father was rarely home prior to divorcing Petitioner's mother. (Pet. Ex. 27 at 1; Pet. Ex. 39 at 1.) Starting around the age of five, Petitioner's brother would cause Petitioner to get in a lot of fistfights. (Pet. Ex. 27 at 1; Pet. Ex. 39 at 3.) Petitioner received the worst and most frequent abuse from his stepmother due to his bed wetting; she would call Petitioner "pissy" in front of other kids and hang his stained sheets out the front window of the house. (Pet. Ex. 27 at 1, 2.) Their stepmother told them their biological mother did not want them, and they were forbidden to mention her. (*Id.* at 2.) After the kids returned to their mother's house, Petitioner was a changed person, he was not motivated, and he had problems in school and dropped out. (*Id.* at 2; Pet. Ex. 39 at 3.)

The following information was developed during the federal habeas proceeding. Petitioner's mother and

father often fought; when Petitioner's parents got divorced, his father unsuccessfully asked some of his wife's relatives to care for the children because he thought his wife did not take care of the kids. (Pet. Ex. 32 at 7-8; Pet. Ex. 42; Pet. Ex. 43 at 2.) According to their father and a friend, but not reported by the children, Petitioner's mother's house was filthy. (Pet. Ex. 32 at 7; Pet. Ex. 31.) Petitioner was traumatized by his parents' divorce (Pet. Ex. 28 at 3) and thought it was due to the way his cleft palate made him look (RT 4/16/07 at 47). Other kids made fun of Petitioner because of his cleft palate and his bedwetting. (Pet. Ex. 35 at 1; Pet. Ex. 36 at 2; RT 4/16/07 at 75-76.) Petitioner did not have his own friends and sometimes his siblings picked on him. (Pet. Ex. 28 at 9.)

Petitioner's stepmother would dress him as a girl for Halloween or events. (Pet. Ex. 37 at 2; RT 4/16/07 at 56.) Sometimes their stepmother would not feed them, and if their father was not home they would eat hot dogs or TV dinners while their stepmother ate steak. (Pet. Ex. 37 at 6.) In addition to being tied up in the yard, his stepmother tied Petitioner up in the garage, behind the fence, and in the basement. (Pet. Ex. 28 at 5; Pet. Ex. 37 at 4.) All the children in the family had to do extensive chores and were constantly grounded. (Pet. Ex. 28 at 6.) On occasion their father would slap or beat them as punishment. (*Id.* at 7-8.) Petitioner had poor coping skills for dealing with the abuse. (*Id.* at 4; RT 4/16/07 at 66-67.) After the abuse by his stepmother began, Petitioner became withdrawn, quiet, and sad, and stopped showing emotion. (Pet. Ex. 28 at 9; Pet. Ex. 37 at 6; Pet. Ex. 40

at 5.) Petitioner slept poorly when he was younger, with his eyes open, and he would sleepwalk and have nightmares. (Pet. Ex. 37 at 15; RT 4/16/07 at 64, 71.) Petitioner would wake afraid, thinking he was hearing his stepmother's voice or that someone was downstairs. (Pet. Ex. 28 at 2.)

Petitioner idolized his stepfather, the only father figure he ever had; however, his stepfather sometimes became very angry at him. (*Id.* at 14; Pet. Ex. 48 at 1.) When Petitioner returned to his mother's custody, she essentially abandoned him because she felt left out of the relationship between Petitioner and his stepfather. (Pet. Ex. 28 at 12, 14; Pet. Ex. 34 at 3; Pet. Ex. 42; Pet. Ex. 43 at 2.) In addition to her prescription drug addiction, Petitioner's mother drank a lot. (Pet. Ex. 28 at 15; Pet. Ex. 34 at 1; RT 4/16/07 at 104.) When Petitioner was around the age of fourteen, he and his stepfather would watch each other have sex with both girls and women, including an adult married friend of his stepfather. (Pet. Ex. 28 at 14; Pet. Ex. 34 at 2; Pet. Ex. 37 at 11-12; Pet. Ex. 40 at 7; RT 4/16/07 at 103.) Petitioner's stepfather promised him he would be able to take over the farm where they worked, which was Petitioner's dream, but his stepfather lost the farm due to his drinking; Petitioner was devastated by the loss of the farm and his ability to spend all day with his stepfather. (Pet. Ex. 28 at 11; RT 4/16/07 at 108; RT 4/17/07 at 162.) In eleventh grade, Petitioner moved to Michigan to live with his father and stepmother but after a year and a half he returned to Kansas to live with his sister and brother-in-law. (Pet. Ex. 28 at 16; Pet. Ex. 32 at 11.)

With the exception of Petitioner's exposure to and participation in inappropriate sexual activity with his stepfather, and the loss of a farming career, the information developed since the time of sentencing is not substantively new. The majority of the information presented at the evidentiary hearing merely provides additional detail and examples of the same type of evidence considered by the sentencing judge. Counsel specifically argued at sentencing that Petitioner's abusive background, including the parental encouragement to drink at a young age, was a causal factor in the murder and should mitigate Petitioner's punishment. (RT 2/8/95 at 13.) The limited added information is not of significant weight in light of the substantial information about the constant and severe abuse and neglect Petitioner experienced as a child of which the sentencing judge was well-informed. *See Brown v. Ornoski*, ___ F.3d ___, No. 05-99008, 2007 WL 2713113 at *7 (9th Cir. September 19, 2007) (finding that additional abuse evidence unlikely to alter outcome where similar information was presented at sentencing). Further, Petitioner was thirty at the time he committed the murder; thus, under Arizona law, his traumatic childhood may be of less significant mitigating value. *See State v. Ellison*, 213 Ariz. 116, 144, 140 P.3d 899, 927 (2006) (finding childhood experiences of little mitigating value for murders committed at thirty-three where there was no evidence defendant could not tell right from wrong); *Hampton*, 213 Ariz. at 185, 140 P.3d at 968 (finding horrendous childhood less weighty, in part, because defendant was thirty at the time of the crime).

PTSD

Petitioner's psychiatric expert, Dr. Amezcua-Patino, diagnosed Petitioner with Post Traumatic Stress Disorder in remission. (Pet. Ex. 8 at 11, 18.) In his testimony, the doctor stated that Petitioner suffered from symptoms of PTSD from age four or five to age nine. (RT 4/17/07 at 74, 99-101.) Dr. Amezcua-Patino testified that Petitioner's primary coping mechanism for the trauma, other than the use of alcohol, was withdrawal and avoidance of conflict and the possibility of trauma. (*Id.* at 78-79, 87.) Similarly, Petitioner's neuropsychological expert testified that Petitioner had suffered from PTSD at times in his life. (RT 4/19/07 at 93, 108.) This evidence was presented for the first time in this federal habeas proceeding; there was nothing in the state court record related to PTSD.

Although the State's psychiatrist, Dr. Scialli, determined that Petitioner did not have symptoms consistent with PTSD (Pet. Ex. 84 at 7), his evaluation focused on Petitioner's state of mind at the time of the crimes. (RT 4/17/07 at 11-13, 49.) Similarly, the state's psychologist, Dr. Sullivan, found no current indication of PTSD based on his testing of Petitioner (Pet. Ex. 80 at 5-6), but he could not opine on whether Petitioner had ever suffered from PTSD because he evaluated only Petitioner's present functioning. (RT 5/8/07 at 53, 58, 51.)

Because there is no evidence to the contrary, the Court finds that Petitioner established by a preponderance of the evidence that he suffered from symptoms of PTSD up to the age of nine. Despite a few

limited references to symptoms later in life, Petitioner did not demonstrate by a preponderance that he suffered from PTSD in adulthood nor, specifically, at the time of the crime.

The diagnosed PTSD was a response to the childhood abuse Petitioner experienced and may attest to the severity of the abuse; however, because the abuse and the PTSD were coterminous, the PTSD itself does not carry mitigating weight beyond that given to the childhood abuse. As noted by Dr. Amezcua-Patino, "you cannot separate the acute reaction to the trauma from the Post Traumatic Stress Disorder on somebody who is being pervasively and consistently traumatized. So what symptoms are from PTSD and what symptoms are from the fear [of] being beat up on a regular basis is difficult to separate, but he probably had both." (RT 4/17/07 at 100.) Although the trauma of the childhood abuse may have continued to affect Petitioner later in life, Petitioner does not allege that PTSD continued to affect him at times that he was not experiencing symptoms. Similarly, Petitioner does not assert that anything about the events the night of the murder would have triggered a trauma reaction. Further, his reaction to trauma as a child was identified as withdrawal and avoidance, not aggression. None of the experts suggested that PTSD had any impact on Petitioner's actions or mental state at the time of the crime. Thus, the Court considers Petitioner's PTSD as additional evidence relevant to the mitigating factor of childhood abuse. Because the trial court was aware of the severity of the abuse at the time of the sentencing, the PTSD diagnosis relevant to the same time frame is not of significant new weight.

Substance abuse

Petitioner argues that he has a genetic propensity for substance addiction and has a long history of addiction to alcohol and drugs. Counsel did not specifically identify a genetic propensity for addiction at the time of sentencing; however, the PSR and attached psychological report noted that Petitioner's mother had an addiction to prescription drugs. (Pet. Exs. 71, 60, 61.) His mother's addiction also was noted in the 1991 psychological evaluation, in which Dr. Boyer referred to familial and personal substance abuse during Petitioner's developmental years. (Pet. Ex. 58 at 6-7.)

In her letter filed prior to sentencing, Petitioner's sister reported that, by the age of thirteen, Petitioner had begun drinking regularly and openly with his stepfather, who encouraged it, and was using speed and marijuana. Petitioner's stepfather was a heavy drinker who began drinking in the morning and would stay out all night drinking with Petitioner. At the age of fifteen, Petitioner totaled his stepfather's truck while out drinking with friends, went on a week-long drinking spree with his stepfather, and was capable of guzzling a half-pint of whiskey at one time. Petitioner had some criminal issues as an adult, which his sister correlated with his episodic drinking. He had a DUI at the age of eighteen, got into trouble while in the army for a period of heavy drinking, started drinking after his divorce and wrote some bad checks, and went through a chemical dependency program at Larned State Hospital. (Pet. Ex. 24.)

The PSR and attached reports, as well as the 1991 psychological evaluation stated that Petitioner began using alcohol by age nine and had an extensive history of drinking and severe alcoholism. (Pet. Ex. 71 at 12; Pet. Ex. 61 at 4; Pet. Ex. 58 at 4.) The 1991 evaluation noted that Petitioner reported he often got into trouble when using alcohol and that he had frequent alcoholic blackouts in his past and at the time of the crime. (Pet. Ex. 58 at 5.) The reports noted that Petitioner's drug use started soon after he began drinking and that he had an extensive history of drug use, including marijuana and speed. (*Id.* at 4; Pet. Ex. 60 at 1; Pet. Ex. 61 at 4; Pet. Ex. 71 at 12.) There was also a reference to his placement as an adult in a state hospital for substance abuse. (Pet. Ex. 58 at 6; Pet. Ex. 71 at 12-13.)

Since the time of sentencing, Petitioner has developed the following additional evidence. Petitioner's paternal grandfather and great-uncle and his father's two half-brothers were all significant drinkers or alcoholics. (Pet. Ex. 32 at 1-2.) Petitioner's father started drinking at a young age, was always a heavy beer drinker, and became an alcoholic. (Pet. Ex. 28 at 1; Pet. Ex. 32 at 3-4; Pet. Ex. 42.) Petitioner's mother also drank a lot. (Pet. Ex. 28 at 15; Pet. Ex. 34 at 1; Pet. Ex. 32 at 6; RT 4/16/07 at 101.) Petitioner's first alcohol, around the age of ten, occurred when he and his brother would sneak whiskey from their father. (Pet. Ex. 28 at 12-13; Pet. Ex. 37 at 9.) Petitioner could drink almost unlimited quantities as a teen, a case of beer or a fifth of bourbon. (Pet. Ex. 35 at 2; RT 4/17/07 at 154,159.) Petitioner's excessive drinking continued as an adult and when he drank it was always to a state

of drunkenness. (Pet. Ex. 28 at 13; Pet. Ex. 30 at 1-2; Pet. Ex. 32 at 13; Pet. Ex. 35 at 4.) Petitioner would pass out from drinking or would not remember what happened. (Pet. Ex. 37 at 10, 14-15; Pet. Ex. 48 at 1.) Petitioner's teenage drug use included acid and his mother's percodan and valium. (Pet. Ex. 28 at 13, 15; Pet. Ex. 30 at 2; Pet. Ex. 35 at 2; RT 4/16/07 at 99-100.) After Petitioner's brother died, he drank heavily and did a lot of drugs. (Pet. Ex. 37 at 14.) No expert disagrees that Petitioner has substance dependence in remission. Further, Dr. Froming testified that she reviewed Petitioner's family history of substance abuse because it is something that can be genetically inherited and over which a person is not likely to have significant control. (RT 4/19/07 at 32.) She noted that the risk for alcohol dependence is three to four times higher for close relatives of people with alcohol dependence; the risk is higher the more relatives affected, the closer the biological relationships, and the severity of their problems. (*Id.* at 34.)

Very little new information about Petitioner's substance abuse was developed in this proceeding; rather, slightly more depth was added to the information already known. The only new information developed since sentencing is that related to the history of alcohol abuse in Petitioner's family. As stated by one of Petitioner's experts, the significance of the family history is that Petitioner may have had little control over his substance abuse based on his genetics. Although Petitioner's genetic predisposition to alcoholism may be sympathetic, it is not much more so than the fact that his family encouraged him to abuse substances at a young age, a fact that was

considered at sentencing. Further, the sentencing judge found that Petitioner had satisfied the (G)(1) statutory aggravator – that his capacity at the time of the crime to appreciate the wrongfulness of his conduct or conform it to the law was significantly impaired – based on his consumption of alcohol and possibly cocaine. A.R.S. §13-703(G)(1). Therefore, there is little additional significance to Petitioner's familial history of substance abuse (other than its contribution to his dysfunctional childhood, which is considered as part of the childhood abuse analysis).

Developmental and Mental Health Issues

The only information presented at sentencing about Petitioner's in utero development was the fact that he was born with a cleft palate, which had been surgically corrected. Some developmental information, related to childhood abuse and substance abuse, is discussed above; the remaining relevant information presented at sentencing is discussed below.

Dr. Zimmerman's 1985 psychological evaluation concluded that Petitioner's intelligence fell in the lower part of the bright-normal range and his conceptual problem-solving was normal; he had a lot of underlying anger and felt alienated; he was immature, impulsive, exhibited poor judgment, and had a low tolerance for frustration; he blamed others for his problems; and under stress he may act-out in a poorly planned manner. (Pet. Ex. 60.) Also in 1985, Psychiatrist Thomas Newberry concluded that Petitioner had above average intelligence and no evidence of psychotic processes; he occasionally gave impulsive responses

and was easily frustrated; he has poor self-esteem and views himself as a victim; and Petitioner repeatedly acted in self-destructive ways to ensure failure. (Pet. Ex. 61.)

In her 1991 evaluation, Dr. Boyer concluded there was no evidence of significant psychiatric problems or major mental disorders; however, Petitioner was emotionally impaired, and he had an elevated scale reflecting "oppositional tendencies, nonformity, conflict with authority and antisocial attitudes, beliefs and/or behaviors." (Pet. Ex. 58 at 3, 9.) His profile suggested an antisocial personality disorder because, although he did not present as having a disregard for others, he was alienated and distrustful and projects blame on others. (*Id.* at 9.)

In the PCR proceeding, Petitioner's mother provided some new factual information: Petitioner's cleft palate kept them separated for the first three to four days of his life, he was hospitalized for approximately the first twenty-two days after birth, he had three surgeries by the age of three and stopped breathing for some period of time during his last surgery. (Pet. Ex. 39 at 1.) Dr. Briggs conducted the first neuropsychological testing of Petitioner during the PCR proceedings. Dr. Briggs determined that Petitioner's IQ was in the high average range and his academic abilities were within expectations. (Pet. Ex. 22 at 2.) He stated that Petitioner appeared "immature and alienated," manipulative, "self-indulgent," "narcissistic," "hostile, resentful, and irritable," "very impulsive," blamed others for his difficulties, and may be aggressive. (*Id.* at 3.) Dr. Briggs found no pattern of

cognitive dysfunction, concluding that Petitioner's neuropsychological functioning was normal, which he regarded as an improved assessment relative to what it would have been closer to the time at which he suffered head traumas and engaged in substance abuse. The few impaired performances in testing were not of major clinical significance. (*Id.* at 2, 6.) Dr. Briggs found that psychological/emotional factors were the most significant component of Petitioner's functioning, including the possibility of a severe personality disorder. He concluded that Petitioner's level of impairment may be heightened by an interaction between his emotional status and his mild neuropsychological deficits. (*Id.* at 6.) Finally, he opined that Petitioner's decision-making when affected by alcohol was not reasoned and consequence-driven but instinctual, learned behavior outside of right and wrong. (*Id.* at 6-7.)

In preparation for the evidentiary hearing, Petitioner was examined by several new experts, whose evaluations relied in part on factual information about Petitioner's development that was uncovered during these federal habeas proceedings. Petitioner's mother drank when she was pregnant with him. (Pet. Ex. 32 at 6.) Petitioner was hard to feed as a child due to his cleft palate, and he was a very small, thin child. (Pet. Ex. 28 at 2.) As an infant, Petitioner would repeatedly bang his head on the side of the crib. (Pet. Ex. 43 at 1.) As a child, Petitioner had a concave chest, was knock-kneed and clumsy, was easily confused, and had a hard time learning to dress himself. (Pet. Ex. 37 at 1-2.) Petitioner did not begin speaking until age three and was very difficult to understand even in

kindergarten. (Pet. Ex. 28 at 2.) As an adult, Petitioner's ability to communicate is poor; his attention often wanders, or he speaks so rapidly or is so wordy that people cannot understand him. (*Id.* at 21; Pet. Ex. 35 at 6; Pet. Ex. 37 at 16; Pet. Ex. 49 at 2.) Petitioner was a follower as both a child and an adult. (Pet. Ex. 28 at 2; Pet. Ex. 36 at 1; Pet. Ex. 37 at 17.) When doing a task Petitioner would do it the same way every time even if it was not the best method. (Pet. Ex. 37 at 17.) According to family members, Petitioner lacked insight and the ability to plan, was impulsive, and could not grasp the consequences of his actions. (Pet. Ex. 28 at 19-20; Pet. Ex. 32 at 12.) Petitioner was unable to sustain the day-to-day of a stable environment and was overly sensitive to, and avoided, the minor aggravations that occur between people. (Pet. Ex. 28 at 16.)

Petitioner sustained several head injuries as a youth: when Petitioner was about four years old, he fell in a floor vent and cut his head; around the age of five or six, Petitioner got poked in the eye and had to wear a patch (Pet. Ex. 37 at 2); as a teenager, Petitioner was in two rollover truck accidents, multiple car accidents, and numerous motorcycle crashes without a helmet (Pet. Ex. 28 at 14; Pet. Ex. 30 at 3; Pet. Ex. 32 at 12; Pet. Ex. 35 at 4; Pet. Ex. 39 at 3). In 1987, Petitioner was injured in a serious car accident in which he hit his head. (Pet. Ex. 30 at 2-3.) Additionally, Petitioner was exposed to Lorsban and DEET when he worked on the farm. (*Id.* at 1; Pet. Ex. 34 at 2.)

Petitioner's three experts for this proceeding, Drs. Karen Bronk Froming, Lauro Amezcua-Patino,

and Christopher Cuniff, were all provided with and reviewed extensive statements from family and friends; Petitioner's medical, mental health, school, military, criminal and prison records; Petitioner's parents' divorce and custody records; and other experts' reports. (Pet. Ex. 8 at 1-6; Pet. Ex. 12 at 4-10; Pet. Ex. 16 at 5-7; Pet. Ex. 17 at 2-3.)

Dr. Froming was asked by Petitioner's counsel to conduct a neuropsychological evaluation of Petitioner to opine on his current functioning and assess his functioning at the time of the crime. (RT 4/19/07 at 21.) Dr. Froming's ultimate conclusion is that Petitioner suffers from brain dysfunction, which affects him cognitively, behaviorally, emotionally, and socially. (Pet. Ex. 17 at 9.) More specifically, Dr. Froming determined that Petitioner suffers from impulsive errors in testing, has test results consistent with damage to the right hemisphere of the brain, and has damage in the frontal-subcortical areas of the brain, which causes impulsivity, impulsive errors, and problems in self-monitoring and auditory processing. (Pet. Ex. 16 at 23.) Dr. Froming agrees that Petitioner's functioning on the test batteries given by Dr. Briggs and herself was largely normal; however, she notes that Petitioner had significant difficulties in efficiency and impulsivity in responding. (RT 4/19/07 at 65.) Petitioner prioritizes speed over accuracy in completing tasks. (*Id.* at 73.) In particular, Petitioner's problem solving and reasoning abilities are good, but his ability to control his behavior or to respond to a problem in a measured way is poor, as is his cognitive flexibility in being able to recall rules and self correct (*id.* at 75, 89); these are "selected deficits" that exist

despite his IQ level (*id.* at 89). The most noteworthy aspect of Petitioner's behavior for Dr. Froming was his impulsivity, which she determined to be brain based; Petitioner's errors in reaching a solution were the most extraordinary behavior she has witnessed in her entire practicing history. (*Id.* at 108; Pet. Ex. 16 at 23.) Dr. Froming found that while Petitioner's testing results were often in the unimpaired range, the manner in which he reached his results was often impaired. (Pet. Ex. 16 at 16.)

Dr. Froming believes, like Dr. Briggs (Pet. Ex. 20 at 1), that Petitioner's testing results from 2000 and 2006 were better than if he had been tested at the time of the crime because there would have been recovery of function due to Petitioner's abstinence from drugs and alcohol during that period. (Pet. Ex. 16 at 24; RT 4/19/07 at 39-40.) Further, if Petitioner had been evaluated at the time of sentencing by a neuropsychologist with sufficient background information, "chronic and serious neurological deficits" would have been found. (Pet. Ex. 17 at 10.) She further opined that Petitioner's ability to plan and make error-free decisions would be significantly more impaired while under the influence of alcohol, and that Petitioner's frontal lobe dysfunction is likely to be less apparent in the structure of the testing environment. (Pet. Ex. 16 at 24, 23; RT 4/19/07 at 96.) Dr. Froming opined that the expert information available at sentencing is distinguishable from that presented subsequently because there had not been a neuropsychological evaluation. (RT 4/19/07 at 125.)

Petitioner's psychiatric expert, Dr. Amezcua-Patino, diagnosed him with cognitive disorder not otherwise specified secondary to congenital deficits. (Pet. Ex. 8 at 11; RT 4/17/2007 at 67.) He concluded Petitioner had neuro-psychiatric conditions and cognitive deficits acquired at birth, likely a result of congenital malformations (cleft palate and lip), worsened by abuse and the use of illegal substances. (Pet. Ex. 8 at 17, 18.) In support of this conclusion, Dr. Amezcua-Patino notes that there is a high likelihood of neurocognitive deficits appearing early in life in children with cleft palate, and Petitioner's history indicates cognitive difficulties and neurological coordination problems. (*Id.* at 16, 17.) The subsequent abuse Petitioner experienced is highly likely to have caused a worsening of these problems. (*Id.* at 17.) These deficits impact Petitioner's impulse control and ability to problem solve. (*Id.*) Dr. Amezcua-Patino believes that Petitioner has demonstrated an inability to behave properly, rather than a willingness to misbehave. (RT 4/17/07 at 90.)

Dr. Christopher Cunniff, pediatrician and medical geneticist, concurred that Petitionerhas neurodevelopmental abnormalities.[5] (*Id.* at 143.) He

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[5] Dr. Cuniff is the only one of Petitioner's experts who stated unequivocally that Petitioner's neuropsychological disabilities were "severe." (RT 4/17/07 at 137.) Dr. Cuniff did not conduct any testing nor meet with Petitioner before preparing his report. (Pet. Ex. 12.) Because the above-referenced conclusion was based entirely on the findings of Drs. Froming and

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further determined that Petitioner's profile is consistent with Alcohol Related Neurodevelopmental Disorder (ARND); however, because Petitioner experienced environmental and familial factors that could explain or have contributed to his neurodevelopmental problems, such a diagnosis could not be made. (Pet. Ex. 12 at 3.) The issues from Petitioner's life that are consistent with the central nervous system effect of ARND are impulsivity, and poor planning, executive functioning, and goal setting. (RT 4/17/07 at 135.)

Respondents' neuropsychologist, Dr. James Sullivan, assessed Petitioner's functioning as of the time of his evaluation; he did not conduct a comprehensive neuropsychological assessment. (Pet. Ex. 80 at 1, 6; RT 5/8/07 at 50.) In preparing for his examination of Petitioner, Dr. Sullivan reviewed the reports and data from Dr. Briggs and Dr. Froming (Pet. Ex. 80 at 1-2); he was provided significantly more material that he did not review (RT 5/8/07 at 53). He did not conduct further collateral review because, based on prior testing and his own testing, he determined that Petitioner did not have any neuropsychological dysfunction and had not had any for some time. (*Id.* at 81-82.) Dr. Sullivan assessed Petitioner's intellectual functioning to be in the high average range, with his cognitive function intact and

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Amezcua-Patino (Pet. Ex. 12 at 3; RT 4/17/07 at 137) – neither of whom used that language – the Court does not find support for Dr. Cuniff's finding.

average or above in all areas. (Pet. Ex. 80 at 3, 4, 6.) Dr. Sullivan concluded that Petitioner's profile was one of an "immature, hostile, and extremely impulsive individual who is easily frustrated and often aggressive." (Pet. Ex. 80 at 6.) Dr. Sullivan did not make any formal diagnosis of Petitioner based on his assessment. (*Id.*) Petitioner performed above average on the one neuropsychological test administered by Dr. Sullivan, but based solely on that test the doctor would not opine that Petitioner did or did not have any impairment. (RT 5/8/07 at 20-21.)

Respondents' psychiatric expert, Dr. John Scialli, examined Petitioner to assess his psychiatric status, meaning his state of mind at the time of the offense and/or sentencing. (RT 4/17/07 at 49-50; Pet. Ex. 84 at 2.) He diagnosed Petitioner with alcohol and polysubstance dependence and antisocial personality disorder.[6] (Pet. Ex. 84 at 10.) Dr.Scialli agrees that

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[6] Petitioner maintains he does not have antisocial personality disorder but the State contends such a diagnosis was before the sentencing court and has been confirmed by other experts during these proceedings. The only doctors to diagnose Petitioner with antisocial personality disorder are Larned State Hospital psychologist Lewis Young (a 1986 report newly produced in these proceedings) and Dr. Scialli; in her 1991 report, Dr. Boyer provided only a diagnostic impression of probable antisocial personality disorder (Pet. Ex. 58 at 10). Because Drs. Young and Scialli reviewed essentially no collateral information regarding Petitioner's history (*see* Pet. Ex. 62 at 15; Pet. Ex. 84 at 2-3), other experts agree that review of historical information is critical to such a diagnosis (RT 4/19/07 at 46-47, 98-99, 105-06; RT 5/8/07 at 54-55), and the experts that reviewed substantial amounts of collateral information disagreed with that diagnosis (RT 4/17/07 at

(Continued)

Petitioner has minor brain dysfunction and some frontal subcortical insufficiencies in certain neuropsychological processes, but not significant brain damage and no dysfunction connected to the crime. (RT 4/17/07 at 33-35.) In other words, Dr. Scialli found no brain or emotional impairment that would mitigate Petitioner's culpability for the murder (Pet. Ex. 84 at 11); specifically, that no clinical data indicated that Petitioner was "other than consciously responsible for the offenses" (RT 4/17/07 at 12). Further, he noted that none of Petitioner's experts had explained a connection between the impairments they diagnosed and the offenses. (Pet. Ex. 84 at 12, 11.) Further, he concluded there is nothing in the more recent evaluations that had not been discovered and presented at sentencing. (*Id.* at 12.) Dr. Scialli disagreed with Dr. Froming's conclusions, stating that frontal lobe dysfunction does not mandate behavioral impulsivity. (RT 4/17/07 at 25.) He opined that there can be brain inefficiencies and disorders that have no behavioral consequences. (*Id.* at 56.) Further, Dr. Scialli noted that brain damage that has been associated with aggressive behavior is a distinct part of the brain called the ventro-medial pre-frontal cortex, distinct from the frontal lobe dysfunction found by Dr. Froming. (*Id.* at 25.)

All of the experts agree that Petitioner is of at least average intelligence and that his neuropsychological functioning is largely normal.

(Continued)

89-93; RT 4/19/09 at 115), the Court finds that antisocial personality disorder has not been proven.

However, based on the opinions of Drs. Briggs and Froming, who conducted the only comprehensive neuropsychological testing, the thorough record review conducted by Petitioner's experts, and the concession by Dr. Scialli, the Court finds that Petitioner suffers from some brain dysfunction that causes "selected" neuropsychological deficits. This medical finding, premised on neurodevelopmental and congenital defects, is new and was not presented at sentencing. The primary notable impact of Petitioner's dysfunction, according to Dr. Froming, is impulse control (an issue noted repeatedly by mental health professionals who examined Petitioner over the years, including the 1985 psychological and psychiatric reports attached to the PSR). Drs. Froming and Amezcua-Patino noted that Petitioner has behavioral control problems generally, but did not note any specific behaviors other than impulsivity.

The Court first assesses this evidence as it relates to Petitioner's allegation that the new expert testimony satisfies the (G)(1) statutory mitigating circumstance: "The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703 (G)(1). As discussed above, the sentencing court found (G)(1) based on Petitioner's intoxication at the time of the crime. Due to Petitioner's assertion that he was in an alcoholic blackout at the time of the crime, and has no recollection of it, no one has been able to directly assess his mental state at the time of the crime. Regardless, Petitioner now asserts that (G)(1) also is satisfied by

his brain dysfunction and neurological deficiencies, which are exacerbated when he is intoxicated. As an initial matter, Petitioner did not present any evidence or opinion that Petitioner could not appreciate the wrongfulness of his conduct based on mental impairments;[7] thus, the Court assesses only whether Petitioner satisfies the prong of (G)(1) based on inability to conform his conduct to the law.

First, according to his experts, the primary consequence of Petitioner's impairments is impulsivity. However, there is no evidence that the victim initiated the altercation leading to her murder or engaged in any behavior that would trigger an impulsive response from Petitioner. More significantly, the crime was not impulsive. Petitioner harassed and threatened the victim for a period of time before kidnapping her at knife point, removing her from the house to the car, and subsequently murdering her. Thus, the circumstances of the crime do not indicate that Petitioner's impulsivity precluded him from behaving in conformance with the law. Further, the Arizona courts do "not equate impulsivity or poor judgment with mental inability to conform one's conduct to the law." *See State v. Hoskins*, 199 Ariz. 127, 149, 14 P.3d 997, 1019 (2000).

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[7] Petitioner's disposal of the body in a remote location and flight from the state indicate that he could in fact appreciate the wrongfulness of his actions. *See State v. Poyson*, 198 Ariz. 70, 81, 7 P.3d 79, 89 (2000).

Second, although Petitioner's impairments are described as present from birth and aggravated by events in his childhood, Petitioner has essentially no history of violence prior to the murder, which undercuts his argument that he could not conform his conduct to the law. There is no evidence that Petitioner's impulsiveness in testing and as noted by others translates to violent behavior in the real world. (*See* RT 4/17/07 at 25 (noting that frontal lobe executive functioning is a distinct portion of the brain from that associated with aggressive behavior).) To the contrary, numerous family members and friends attested that they knew Petitioner to be a non-violent individual even when drinking (Pet. Ex. 27 at 3; Pet. Ex. 29; Pet. Ex. 33; Pet. Ex. 35 at 5; Pet. Ex. 39 at 3), and Dr. Boyer opined that there was no indication violence was a characterological pattern (Pet. Ex. 58 at 8).[8] In sum, Petitioner has not proven that his neurological impairments standing alone satisfy the (G)(1) factor (*see* RT 4/17/07 at 12, 34 (finding by Dr. Scialli that no clinical data indicated that Petitioner was not consciously responsible for the crime)). *See Hoskins*, 199 Ariz. at 148-49, 14 P.3d at 1018-19 (finding essential to establishing the (G)(1) factor that

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[8] Dr. Briggs noted that Petitioner may act based on instinct not reason (Pet. Ex. 22 at 6-7) and Dr. Amezcua-Patino noted that Petitioner historically is not unwilling but unable to behave (RT 4/17/07 at 90). These comments were not specific to Petitioner's brain dysfunction rather than his personality features, did not address the issue of violence, and were not about his behavior at the time of the crime; in fact, Dr. Briggs's opinion was based primarily on Petitioner's functioning when affected by alcohol (Pet. Ex. 22 at 6-7).

experts offer "proof of actual causation between the impairment and the criminal act").

Petitioner has strengthened his argument that his alcohol and drug dependence, which exacerbates his impairments, was largely out of his control and due to numerous biological and environmental influences. This makes the (G)(1) factor somewhat more sympathetic than voluntary intoxication and may increase the weight of the factor. However, the additional weight is limited as Petitioner was aware of his pattern of drinking to excess he drank and had periods prior to the crime when he was able to not drink (Pet. Ex. 37 at 17; RT 4/19/07 at 60-61). Further, the sentencing judge was aware when he found and weighed the (G)(1) factor that Petitioner's substance dependence began in childhood at the encouragement of a parental figure.

Next, the Court assesses this category of evidence as relevant for non-statutory mitigation. Unrelated to the crime, there is nothing inherently mitigating in the fact that Petitioner is impulsive in his day-to-day life. Because Petitioner has not established that his neurological impairments prevented him from complying with the law or knowing right from wrong at the time of the crime, they are not of significant non-statutory mitigating weight. *Johnson*, 212 Ariz. at 440, 133 P.3d at 750 ("[T]he weight to be given [to] mental impairment should be proportional to a defendant's ability to conform or appreciate the wrongfulness of his conduct.") (quoting *State v. Trostle*, 191 Ariz. 4, 21, 951 P.2d 869, 886 (1997)); *Ellison*, 213 Ariz. at 144, 140

P.3d at 927 ("The relationship between the mitigation evidence and the crime . . . can affect the weight given to such evidence.") (citing *Newell*, 212 Ariz. at 405, 132 P.3d at 849). Petitioner has not proven that he suffers from a mental impairment which is a "major contributing cause" to his conduct at the time of the crime. *See State v. Stuard*, 176 Ariz. 589, 610, 863 P.2d 881, 902 (1993) (finding of significant weight and meriting leniency evidence of severe organic brain damage resulting in dementia and a borderline retarded IQ that were significant causative factors in the murders). The Court finds that Petitioner's impairments (selected deficits causing impulsivity) are entitled to only minimal mitigating weight because he has no history of violence or evidence that the impairments cause aggression, the crime was not impulsive, and the experts agree that Petitioner is largely cognitively normal with at least an average IQ (*see* RT 5/8/07 at 80-81 (Dr. Sullivan notes there is a five percent error rate in neuropsychological testing and that normal people with no brain damage will have some impaired performances)). *See State v. Stokley*, 182 Ariz. 505, 521, 898 P.2d 454, 470 (1995) (giving some mitigating weight to Petitioner's head injuries and impulsive control problems, but finding it offset by average IQ and fact that crime was not impulsive); *Johnson*, 212 Ariz. at 440, 133 P.3d at 750 (finding evidence of some frontal brain dysfunction and executive function impairment of *de minimis* mitigation weight because cognitive abilities average and intact).

Familial Love

In the letters submitted at sentencing, Petitioner's sister informed the court that Petitioner always had a home with her family (Pet. Ex. 24 at 3), that Petitioner had family support and close sibling relationships, and that she loved him dearly (Pet. Ex. 26). Additionally, counsel asserted at sentencing that Petitioner was father to a ten-year-old son.

The evidence developed during these proceedings reiterated that numerous family members and friends support Petitioner, believe him to be talented, generous and kind, love him, and would be devastated by his execution. (Pet. Ex. 28 at 22; Pet. Ex. 30 at 4; Pet. Ex. 32 at 14; Pet. Ex. 36 at 8; Pet. Ex. 39 at 3; RT 4/17/07 at 165, 167.) If Petitioner were to be resentenced to life in prison, his sister and brother-in-law would begin plans to move to Arizona in order to visit him regularly. (RT 4/17/07 at 165-66, 167-68.) Petitioner has kept in touch with his son through letters and some phone calls; his son feels like Petitioner provides him support, and he knows he is loved by him. (RT 4/19/07 at 7, 9-10, 12.)

Petitioner has proven by a preponderance of the evidence that his family loves and supports him. However, the evidence in support of this factor is not significantly different than that provided by his sister at sentencing. Further, while love of family can be considered mitigating, it carries limited weight in Arizona in light of the fact that it did not prevent Petitioner from committing a heinous murder. *See State v. Phillips*, 202 Ariz. 427, 440, 46 P.3d 1048, 1061 (2002); *State v. Gonzales*, 181 Ariz. 502, 515, 892

P.2d 838, 851 (1995) (familial support entitled to, at most, *de minimis* weight).

Adaption to Prison Environment

Petitioner's neuropsychological expert and sister opined that Petitioner has done and/or would do well in the structure of a prison environment, with limited choices and clear rules. (Pet. Ex. 16 at 23; Pet. Ex. 28 at 21.) This Court must assess whether the result of the sentencing would have been different if counsel had presented this information. In the addendum to the PSR, the probation department stated that Petitioner had been written up five times, including a major infraction, during the time he had been in prison since his first trial. (Pet. Ex. 71 at 1.) At the time of the aggravation/mitigation hearing, Petitioner's counsel contended that, if the sentencing judge were going to consider that information, counsel would like further documentation. (RT 2/6/95 at 23.) The Court agreed not to consider Petitioner's record of behavior in prison. (*Id.*) Petitioner has not presented any evidence regarding his adaption to prison specific to the period prior to his 1995 sentencing; thus, Petitioner has not proven by a preponderance of the evidence that he was well-adapted to prison at the time of his sentencing. The Court will not consider this as a mitigating factor. Even if this were considered, all prisoners are expected to behave and adapt to life in prison; therefore, the state courts do not afford much weight to this as a mitigating factor. *See State v. Tucker*, 215 Ariz. 298,

322, 160 P.3d 177, 201 (2007); *State v. Hinchey*, 181 Ariz. 307, 314-15, 890 P.2d 602, 609-10 (1995) (model prisoner behavior not necessarily mitigating).

Cumulative Prejudice Assessment

Petitioner makes several specific arguments regarding why the PCR court's ruling regarding prejudice is contrary to or an unreasonable application of Supreme Court law. First, Petitioner contends that the ruling is contrary to controlling law because the facts of his case are materially indistinguishable from *Wiggins* and *Williams*. The Court disagrees. In both of those cases no mitigation of any weight was presented or argued to the jury, *Wiggins*, 539 U.S. at 515-16; *Williams*, 529 U.S. at 367; in contrast, here, significant mitigating information was argued and available for review by the judge.

Second, Petitioner argues that the PCR court's ruling is unreasonable because it failed to consider all of the factual evidence presented. Again, the Court disagrees. The PCR court categorized the new evidence as falling into two categories: expert neuropsychological evidence by Dr. Briggs and evidence regarding Petitioner's abusive dysfunctional childhood (not specifically limited to physical child abuse as suggested by Petitioner), which was contained in statements by Petitioner's mother, sister, and stepfather. This fairly summarizes the allegations and evidence presented in the PCR proceeding. (*See* ROA-PCR Doc. 13 at 15-19, Exs. 7-10.) Additionally, the

PCR court's conclusion that the evidence regarding Petitioner's childhood was cumulative was not objectively unreasonable; as discussed above in the section on childhood abuse, little substantive new evidence not known at sentencing was argued in or attached to the PCR petition.

Third, Petitioner alleges that the PCR court's decision was unreasonable because it ignored evidence in concluding that Dr. Briggs's report was not "significantly different" from the report considered at sentencing. The significant difference that Petitioner points to is Dr. Briggs's conclusion that Petitioner has neuropsychological deficits. Dr. Briggs stated in his report that Petitioner had a few impaired performances on his testing "which do not appear to have major clinical significance." (Pet. Ex. 22 at 2, 6.) While Dr. Briggs noted that Petitioner's functioning was recovered since the time of his head injuries and substance abuse, he concluded that Petitioner's neuropsychological function was normal and that there was no cognitive dysfunction. (*Id.* at 6, 3.) He also stated that Petitioner's psychological and emotional profile was the most significant factor in his behavior. (*Id.* at 6.) Similarly, Dr. Boyer concluded in 1991 that Petitioner's cognitive functioning was grossly intact, that he was of at least average intelligence, that he did not have any major mental disorder or psychiatric disturbance, but that his ability to relate emotionally was impaired and he had antisocial attitudes. (Pet. Ex. 58 at 3, 7, 9.) Dr. Briggs's report is in conformance with all of these findings. In light of the fact that Dr. Briggs indicated that Petitioner's impaired performances were not of clinical significance and emphasized other issues as the major contributing forces in his behavior, the

PCR court's conclusion that his report was not "significantly different" than Dr. Boyer's is not objectively unreasonable.

The Court now assesses whether the PCR court's finding of no prejudice was an objectively unreasonable application of *Strickland*. To do so, the Court assesses the totality of the mitigation, weighs it against the aggravation, and assesses whether there is a reasonable probability that the sentence would have been different if the additional information had been presented. *Wiggins*, 539 U.S. at 534. Petitioner contends that the evidence presented in this proceeding is a significantly more humanizing, wholistic picture than that provided to the sentencing judge. While the quality of mitigating evidence is much more in-depth and has provided a more sympathetic picture, it is clear that the sentencing judge assessed all of the written information available, including the PSR and mental health evaluations, and found numerous mitigating factors. (RT 2/8/95 at 9-10 (finding Petitioner's childhood physical and mental abuse to be a mitigating factor based on the "attachments to [counsel's] proposed sentencing memoranda.").) While in-person testimony often may be important to credibility determinations, there is no question the judge accepted and believed the written testimony provided by Petitioner's sister. Further, counsel urged the judge to consider the connection between the crime and Petitioner's diminished capacity, childhood abuse, lack of prior violent crime convictions, and his remorse, in determining the appropriate punishment. (RT 2/8/95 at 14.)

Petitioner has presented significant evidence of severe abuse and neglect that he suffered as a child; however, this was found to be a mitigating factor by the sentencing court, and the new information is not reasonably likely to have changed the weight of this factor. *See McDowell v. Calderon*, 107 F.3d 1351, 1363 (9th Cir.) (finding failure to introduce additional evidence of abuse, including sexual abuse and substance abuse, not prejudicial when evidence of severe physical abuse was presented), *vacated in part on other grounds*, 130 F.3d 833 (9th Cir. 1997). Although Petitioner demonstrated that he experienced PTSD as a child, it is of little independent weight separate from its cause – the severe abuse he experienced. Petitioner's extensive history of substance abuse and dependence was well documented at sentencing, and the sentencing judge found that Petitioner established both the (G)(1) statutory aggravator based on his intoxication at the time of the crime and a nonstatutory mitigator based on his history of alcohol and drug abuse. The only new related information is Petitioner's familial history of substance abuse, which the Court finds of limited weight in light of Petitioner's extensive known history of substance abuse. Although not discussed in these proceedings, the sentencing court found that Petitioner had proven remorse and considered it to be a mitigating factor; therefore, it is weighed in this Court's assessment.

The one new finding not weighed by the sentencing or PCR court is the conclusion that Petitioner has selected neuropsychological deficits, which cause him to be impulsive. Petitioner has failed to demonstrate that these impairments standing alone

likely would have satisfied the (G)(1) statutory mitigator. However, it adds some weight to the statutory factor, originally based solely on intoxication, and some weight as a non-statutory mitigating factor.

The Court finds that Petitioner's familial love and family relationships are not of meaningful mitigating weight. Further, the Court does not consider Petitioner's alleged adaption to prison to have been proved as a mitigating factor.

In sum, despite extensive additional investigation into Petitioner's background and mental health, Petitioner has not discovered significant new or more weighty mitigation than was considered by the sentencing judge.[9] Although counsel was obligated to have conducted a more thorough investigation and to have presented a more complete picture of the available mitigation, the sentencing judge had a significant amount of information available which he considered and weighed in mitigation. Further, the sentencing judge made specific findings regarding aggravation, which must be weighed in the balance: the victim's throat was cut from ear to ear, almost causing decapitation; the victim struggled for her life

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[9] The Court has reviewed, considered and weighed (to the extent proven) all of the mitigating evidence presented during sentencing and post-conviction, as well as that developed during these habeas proceedings, regardless of whether it has a causal connection to the crime. *Cf. Lambright v. Schriro*, 490 F.3d 1103, 1114-15 (9th Cir. 2007). However, as cited throughout the prejudice analysis, the Court also has considered the weight given to specific types of mitigating evidence under Arizona law.

as reflected by numerous defensive wounds; the victim was alive during a significant portion of the time period during which the wounds were inflicted; the victim suffered severe mental anguish and anxiety for a substantial portion of the approximate fifteen-minute period between her abduction at knife point from her house to the leaving of her body in the desert; the victim experienced excruciating pain and suffering before losing consciousness, based on the number and severity of the stab wounds inflicted with a sharp instrument; the forty wounds were more than required for death, amounting to gratuitous violence; Petitioner relished the killing as reflected in his statement to his co-defendant, "It's dead but it's warm. Do you want a shot at it?"; the killing was senseless in that Petitioner was not in physical risk from the victim; the victim was helpless and Petitioner was able to not only kill her but make unwanted sexual advances on her at the time.[10] The Arizona Supreme Court upheld each of these factual findings and the aggravating factor as a whole. *Detrich II*, 188 Ariz. at 67-68, 932 P.2d at 1338-39.

Pursuant to the AEDPA, this Court is obligated to give deference to the PCR court's conclusion that Petitioner was not prejudiced by the actions of his counsel. Applying that standard, the Court cannot say that it was objectively unreasonable to conclude that, weighing the totality of the mitigating evidence now available against the aggravation, there is not a

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[10] In Claim J of the Amended Petition, Petitioner challenges the (F)(6) aggravating factor as not being supported by sufficient evidence; in a discussion below the Court denies that claim.

reasonable probability that Petitioner's sentence would have been different. Even if Petitioner is correct that no deference is owed under the AEDPA, the Court finds that Petitioner has failed to demonstrate prejudice under *Strickland*.

DISCUSSION OF REMAINING CLAIMS

In addition to Claim B, Petitioner has six claims pending before the Court, Claims E, F, H, I, J, and L. To the extent not previously resolved, the Court addresses the procedural posture and/or the merits of these claims.

Principles of Exhaustion and Procedural Default

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). If a habeas claim includes new factual allegations not presented to the state court, it may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Exhaustion requires that a petitioner clearly alert the state court that he is alleging a specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004); *see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (general appeal to due process not sufficient to present substance of federal claim); *Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), *as amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence, right to be tried by impartial jury, and ineffective assistance of counsel lacked specificity and explicitness required); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or case law, *Lyons*, 232 F.3d at 670, or by citing state cases that plainly analyze the federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc); *cf. Fields v. Washington*, 401 F.3d 1018, 1022 (9th Cir. 2005) (mere citation to a state case that conducts both a state and federal law analysis does not, by itself, satisfy exhaustion).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The

preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. The procedural bar relied on by the state court must be independent of federal law and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). A state procedural default is not independent if, for example, it depends upon a federal constitutional ruling. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam). A state bar is not adequate unless it was firmly established and regularly followed at the time of the purported default. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available pursuant to Rule 32, the claim is "technically"

exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray*, 518 U.S. at 161-62.

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust the claim in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

Claim E

Petitioner alleges that collateral estoppel should have barred the State from litigating the issue of sexual assault in Petitioner's second trial and the court from considering it for purposes of sentencing, because Petitioner was acquitted on the sexual assault charge in his first trial. Respondents concede this issue was exhausted on direct appeal. (Dkt. 61 at 70.)

Petitioner contests admission of the following evidence at his second trial (similar evidence was presented at his first trial (RT 10/24/90 at 78, 83)). Petitioner's co-defendant testified that while he was driving he saw that Petitioner "was on top of [the victim] humping her," in an "up and down motion on her." (RT 12/15/94 at 23, 24.) Charlton testified that

he later looked over and saw that the victim's throat was slit, and Petitioner asked him if he "wanted a shot at it, it is dead but it is warm, you want a shot at it." (*Id.* at 25.)

Background

In Petitioner's first trial, the jury was instructed as follows on sexual assault: "intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person. 'Sexual intercourse' means penetration into the penis, vulva or anus by any part of the body or by any object or manual masturbatory contact with the penis or vulva." (RT 11/2/90 at 33.) The jury was also instructed on the lesser included offense of sexual abuse: "intentionally or knowingly engaging in sexual contact with any person . . . without consent . . . . 'Sexual contact' means any direct or indirect fondling or manipulating of any part of genitals, anus or female breast." (*Id.*) Petitioner was found not guilty of sexual assault but guilty of sexual abuse. (*Id.* at 44-45.)

In Petitioner's second trial, the jury was given the following instruction on the elements of kidnapping: knowingly restricting a person's movements; using physical force to accomplish the restriction; and the restriction was with the intent to inflict physical injury, death, or a sexual offense. (RT 12/20/94 at 149-50.) The trial court found that Charlton's testimony regarding the events of a sexual nature in the car could be presented as relevant

to the third element of the kidnapping charge, intent to commit a sexual offense. (RT 12/13/94 at 131-32.)

The Arizona Supreme Court denied Petitioner's collateral estoppel claim, stating that Charlton's testimony:

> was not offered to prove sexual intercourse, sexual assault, or sexual abuse. Rather it was offered, together with defendant's statements at Souter's home and testimony about Souter's half-nude body, to show defendant's *intent* to commit a sexual offense, an element of the offense of kidnapping. At the second trial, whether defendant actually had sexual intercourse with or sexually abused Ms. Souter was irrelevant; however, the state could, and did, offer the evidence to show that defendant intended to commit a sexual offense on the victim.

Detrich II, 188 Ariz. at 63, 932 P.2d at 1334.

Analysis

Collateral estoppel means "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future" case. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This principle is embodied in the Fifth Amendment prohibition against double jeopardy. *Id.* at 445. The Court in *Ashe* explained further the process:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Id. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). *Ashe* does not preclude evidence, otherwise admissible, "simply because it relates to alleged criminal conduct for which a defendant has been acquitted," if "the prior acquittal did not determine an ultimate issue in the present case." *Dowling v. United States*, 493 U.S. 342, 348 (1990). Petitioner bears the burden of demonstrating that "the issue he seeks to foreclose was actually decided in the first proceeding." *Id.* at 350.

Petitioner asserts that all of Charlton's testimony regarding acts of a sexual nature by Petitioner in the car should have been foreclosed from presentation at his second trial because he was acquitted of sexual assault. Because Charlton's testimony was the only evidence of sexual assault, Petitioner argues the jury necessarily rejected all of Charlton's testimony regarding any sexual acts by Petitioner. Petitioner alleges that the sexual abuse conviction arose, not from Petitioner's actions in the car, but from his earlier actions as testified to by other witnesses, Gwen Souter and Tami Winsett. The Court disagrees; the Arizona Supreme Court also rejected

this argument, *Detrich II*, 188 Ariz. at 63, 932 P.2d at 1334. Contrary to Petitioner's argument, a thorough review of the transcripts from Petitioner's first trial reveals that the sexual abuse conviction was necessarily based on Charlton's testimony of the events in the car.[11] Neither Souter nor Winsett testified to any actions on the part of Petitioner amounting to sexual contact sufficient to sustain a sexual abuse charge. (*See* RT 10/31/90 at 3-11, 27-46.) As the Arizona Supreme Court concluded, "the jury must have determined that Charlton saw defendant engage in some form of sexual contact, but that Charlton's description of what he saw and heard fell short of describing completed sexual intercourse." *Detrich II*, 188 Ariz. at 63, 932 P.2d at 1334. Thus, the fact of Petitioner's acquittal on sexual assault did not foreclose Charlton's testimony regarding sexual contact or a sexual offense in the car.

The only issue related to a sexual offense that was litigated in Petitioner's second trial was whether he had the intent to commit a sexual offense.[12]

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[11] In making his argument, Petitioner relies, in part, on testimony from his second trial. (*See* Dkt. 75 (citing RT 12/14/94 at 33; RT 10/31/90 at 9, 32; RT 12/14/94 at 79-81).)

[12] At Petitioner's second trial, the State did not introduce or argue explicit evidence of sexual intercourse; rather, it introduced only the brief ambiguous testimony that Petitioner was "humping" the victim. In contrast, it was Petitioner's counsel who tried to impeach Charlton with prior inconsistent statements about whether Petitioner had vaginal sex with the victim. (RT 12/15/94 at 47-48.)

Petitioner's argument that his intent to commit sexual assault was litigated and decided in his favor in the first trial sweeps too broadly. The jury at Petitioner's first trial could have believed he had the intent to commit sexual assault, but determined that there was not enough evidence to find beyond a reasonable doubt that he actually committed sexual assault.[13] *See Dowling*, 493 U.S. at 352 (concluding the petitioner had not carried his burden of demonstrating that a prior acquittal decided an ultimate issue in the subsequent trial); *see also Schiro v. Farley*, 510 U.S. 222, 233-34 (1994). Further, all that was necessary to the kidnapping charge in the second trial was intent to commit a sexual *offense*, not intent to commit a sexual assault nor proof of intercourse. *See United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997) (barring a "subsequent prosecution only when a fact 'necessarily determined' in the first prosecution is an essential element of the offense charged in the subsequent prosecution."). The first jury determined beyond a reasonable doubt that Petitioner committed a sexual offense; thus, the State was not collaterally estopped from presenting evidence of those acts. Based on the testimony presented, the jury could have premised a verdict of kidnapping on intent to commit a sexual offense, without concluding that Petitioner had sexual intercourse with the victim; thus, there is no collateral estoppel violation. *See Ashe*, 397 U.S. at 444-45

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[13] The jury may have concluded that sexual assault was not proven beyond a reasonable doubt because the medical examiner testified that there was no evidence of intercourse. (RT 11/1/90 at 40.)

(second prosecution barred where prior acquittal necessarily established that defendant was not present at the robbery).

The Arizona Supreme Court's denial of this claim was not an unreasonable application of *Ashe*. Habeas relief is therefore denied.

Claim F

Petitioner argues that his right to be free of double jeopardy was violated by the trial court's reliance on evidence of sexual assault, of which Petitioner had been acquitted at his first trial, in deciding to impose the death penalty. The Court previously found this claim exhausted on direct appeal. (Dkt. 93 at 23.) The Arizona Supreme Court held that the State did not accuse Petitioner of sexual assault or ask the jury to find him guilty of sexual assault at his second trial; because the evidence was properly admitted, the court found Petitioner's claim of improper admission of the evidence at sentencing to be moot. *Detrich II*, 188 Ariz. at 64 n.4, 932 P.2d at 1335 n.4.

In imposing sentence, the judge stated that the victim was helpless, one of the five factors for the heinous/depraved aggravating circumstance, based, in part, on the fact that "the Defendant not only was able to kill the victim, but also was able to make unwanted sexual advances on her at the time." (RT 2/8/95 at 8.) Petitioner argues that the sexual advances referenced by the judge was the alleged sexual assault of which

Petitioner was acquitted in his first trial. Petitioner contends his sentence violated the Double Jeopardy clause because it was premised on a crime of which he had been acquitted.

In resolving Claim E above, this Court determined that Petitioner's sexual abuse conviction was premised on Petitioner's actions in the car in proximity to the time he killed the victim. Therefore, the judge's reference at sentencing to Petitioner's sexual advances on the victim did not necessarily refer to a sexual assault; rather, it appropriately referred to properly admitted evidence of sexual conduct that resulted in a sexual abuse conviction. Because the factual premise of this claim fails, it is without merit. The Arizona Supreme Court's denial of this claim was not an unreasonable application of *Bullington v. Missouri*, 451 U.S. 430 (1981) (finding that life sentence by jury in a capital sentencing proceeding amounted to acquittal of death penalty and double jeopardy barred seeking a death sentence upon retrial) or *Arizona v. Rumsey*, 467 U.S. 203 (1984) (applying principles of *Bullington* to Arizona's judge-sentencing scheme). This claim is denied.

Claim H

Petitioner alleges that the prosecutor improperly vouched for his co-defendant by eliciting a statement from Charlton that his plea agreement required him to testify truthfully. Petitioner asserts this claim was raised in his PCR petition. The Court disagrees. Petitioner raised an IAC claim for failure to object to Charlton's testimony about the plea agreement's

truthfulness provision, but he did not assert it as a claim of prosecutorial misconduct. (ROA-PCR Doc. 13 at 19.) It is not enough to raise a similar claim or to put all the necessary facts before the state court, a petitioner must fairly present to the state courts the substance of the federal legal claim asserted in the habeas proceeding. *See Harless*, 459 U.S. at 6.

Regardless of exhaustion, this claim is without merit. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of unexhausted claims on the merits); *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (holding that a stay is inappropriate in federal court to allow claims to be raised in state court if they are subject to dismissal under (b)(2) as "plainly meritless"). In a prior order, the Court evaluated Petitioner's related IAC claim and determined that Charlton's limited testimony that his plea agreement required him to testify truthfully did not amount to vouching. (Dkt. 93 at 37 (citing *United States v. Tavakkoly*, 238 F.3d 1062, 1065 (9th Cir. 2001); *United States v. Necoechea*, 986 F.2d 1273, 1278-79 (9th Cir. 1993).) To the extent the testimony elicited could be considered vouching, Petitioner cannot establish that the limited reference to the truthfulness provision "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (prosecutorial misconduct is reviewed in a habeas proceeding under the narrow standard of due process) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). Claim H is denied on the merits.

Claim I

Petitioner alleges that his due process rights were violated by the premeditation jury instruction because it relieved the state of proving the actual reflection necessary for first degree murder, allowing a conviction based merely on the passage of time. Petitioner concedes that he raised this issue for the first time in a motion for rehearing from the denial of his PCR petition. That is not a procedurally appropriate manner to fairly present a postconviction claim. *See* Ariz. R. Crim. P. 32.5 (requiring all known claims to be included in petition); Ariz. R. Crim. P. 32.6(d) (requiring good cause and leave of court to amend petition); Ariz. R. Crim. P. 32.9(a) (allowing a motion for rehearing to set forth how the party believes the court erred in its final decision); *see also O'Sullivan*, 526 U.S. at 848 (requiring that claims be presented in a procedurally proper manner).

Regardless of exhaustion, this claim is without merit. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277. The relevant jury instruction stated:

> Premeditation means, one, that a person either intends or knows that his conduct will result in the death of another person; and two, his intention or knowledge exists before the killing long enough to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. But no appreciable length of time must elapse between the formation of the intent to kill and the act. They may be as instantaneous as successive thoughts in the mind. However, it must be longer than the time required to form the intent

> or knowledge that such conduct will cause death, and may be proven by direct or circumstantial evidence.

(RT 12/20/94 at 154.) Contrary to Petitioner's argument, in the *Thompson* case, the Arizona Supreme Court did not find the instruction at issue unconstitutional; rather, it found erroneous a premeditation instruction that stated "actual reflection is not required." *State v. Thompson*, 204 Ariz. 471, 480, 65 P.3d 420, 429 (2003). The court "discourage[d]" the use of the term "instantaneous as successive thoughts of the mind," *id.* at 479, 65 P.3d at 428; however, the use of an "undesirable, erroneous, or even 'universally condemned'" instruction does not equate to a constitutional violation, *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Further, the Arizona Supreme Court previously upheld a virtually indistinguishable instruction. *See State v. Guerra*, 161 Ariz. 289, 293-94, 778 P.2d 1185, 1189-90 (1989).

When a particular jury instruction is challenged, the question is whether the erroneous instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. This Court must assess "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). Due process requires that the state prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Sandstrom v. Montana*, 442 U.S.

510, 520-21 (1979). Petitioner's allegation is that the premeditation jury instruction relieved the prosecution of the burden of proving actual reflection beyond a reasonable doubt.

The Court finds that, on its face, the challenged jury instruction does not permit a finding of premeditation based solely on the passage of time. First, it explicitly distinguishes intent as existing before, and as something distinct from, reflection. Second, the exclusion of acts that are the "instant effect of a sudden quarrel or heat of passion" from a finding of premeditation clarifies that impulsive acts do not satisfy the premeditation requirement. The case of *State v. Ramirez*, 190 Ariz. 65, 67-68, 945 P.2d 376, 378-79 (Ct. App. 1997), upon which Petitioner relies, is distinguishable because the instruction at issue in that case did not include the "instant effect" language used at Petitioner's trial; the court in *Ramirez* found that such language would have balanced the remainder of the instruction by making clear that the act cannot be both impulsive and premeditated. Third, nothing in the prosecutor's closing argument (RT 12/20/94 at 75-76) or the court's instructions inaccurately suggested that the State needed only to prove the time element of reflection in lieu of actual premeditation.

Finally, the facts of this case are sufficient to support a finding of premeditation. As summarized by the Arizona Supreme Court, witnesses testified that Petitioner became angry at the victim for purchasing him bad drugs; he harassed her for a period of time at her house, held a knife to her throat and threatened to kill her; ultimately, he took her to the car at knife point. The pathologist testified that the victim suffered

numerous cutting wounds over her hands, which are consistent with defensive-type injuries one would sustain while trying to fend off an attacker, and she suffered over forty stab wounds as well as blunt force injuries. Petitioner confessed to a friend that he killed h because she had purchased bad drugs. The Court ds there is not a reasonable likelihood that the jury applied the premeditation instruction in violation of due process by lessening the prosecution's burden to prove premeditation beyond a reasonable doubt.

Claim J

Petitioner alleges there was insufficient evidence to support the (F)(6) aggravating factor. The Court previously determined that this claim was exhausted on direct appeal. (Dkt. 93 at 25.) The Arizona Supreme Court upheld both prongs of the (F)(6) aggravating factor (cruelty and heinousness/depravity), as found by the trial court.

The appropriate standard of federal habeas review of a state court's application of an aggravating circumstance is the "rational factfinder" standard; i.e., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This type of claim is properly analyzed under the deferential standard of § 2254(d)(1); thus, the Court asks whether it was an objectively unreasonable application of *Jackson* for the Arizona Supreme Court to deny this claim. *See Sarausad v. Porter*, 479 F.3d 671, 677-78

(9th Cir.), *vacated in part on other grounds*, ___ F.3d ___, No. 05-35062, 2007 WL 2588811 (9th Cir. Sept. 10, 2007).

As an initial matter, Petitioner attempts to rebut the entirety of the (F)(6) factor by asserting that his co-defendant Charlton was the actual killer. A thorough review of the trial record reveals that there is more than enough evidence, when viewed in the light most favorable to the prosecution, to conclude that Petitioner was the actual killer. This is strongly supported by the jury verdict, in which nine of the jurors found beyond a reasonable doubt that Petitioner was guilty of premeditated murder. (ROA-II 198.) Similarly, the trial judge determined beyond a reasonable doubt that Petitioner killed the victim. (RT 2/8/95 at 3-4.)

Cruelty Prong

The Arizona Supreme Court made the following findings regarding the crime being especially cruel:

> To find cruelty, the state must prove beyond a reasonable doubt that the victim consciously suffered physical pain or mental distress. In determining whether a murder was especially cruel, we must view the entire murder scenario, not just the final act that killed the victim. Having done so, we have determined that this murder was, without a doubt, especially cruel.
>
> We find overwhelming evidence that the victim was conscious throughout much of the crime. Witnesses testified that the victim looked

terrified as defendant dragged her to the car. The pathologist testified that the victim suffered numerous cutting wounds over her hands, which are consistent with defensive-type injuries one would sustain while trying to fend off an attacker. After her throat was slit, she attempted to answer defendant's questions, but was able only to gurgle in response. The defense contends that her gurgling may have been merely reflexive breathing. However, her gurgling was heard only after questions were posed to her.

We find that the victim suffered physical pain. She suffered forty cutting and stab wounds about her face, hands, chest, neck, abdomen, and thigh. This includes a deep cutting wound that stretched across the victim's neck from ear to ear, cutting through the voice box, the esophagus, and into the cerebral column. Furthermore, she suffered blunt force injuries, including bruises on her nose, jaw, and scalp, and scraping and tearing of the lining of her mouth. She must have suffered excruciating pain before she died.We also find that the victim suffered mental distress. Mental distress includes uncertainty as to one's ultimate fate. Witnesses testified that defendant held a knife to the victim's neck, told her that he was going to kill her, and dragged her to the car. During this time, the victim had "terror" and "fear" in her eyes. Anyone in the victim's situation would have been uncertain as to his or her ultimate fate. Thus, this murder was especially cruel.

Detrich II, 188 Ariz. at 67-68, 932 P.2d at 1338-39 (citations omitted).

Petitioner contends the evidence is not sufficient to support a finding that the victim consciously suffered physical pain. Specifically, he asserts that the presence of multiple wounds is not sufficient without additional evidence; the medical examiner could not determine when the victim lost consciousness; the throat wound, combined with the other fatal wounds, would have caused a quick loss of consciousness due to loss of blood; the codefendant's description of the victim making gurgling sounds could have been merely an attempt to breathe or other involuntary action; the wounds on the victim's hands were not definitively defensive wounds; and the co-defendant did not testify that the victim struggled.

In a prior order, denying Petitioner's request for factual development to rebut the cruelty finding, this Court made the following determination:

> The finding that [the victim] attempted to speak after having her throat slit is only a partial basis for the cruelty finding, and the prong is sufficiently supported without it. Petitioner does not allege he can develop forensic evidence that would fully rebut the finding that the victim was conscious for much of the crime and suffered pain and mental distress, even if there were additional evidence about when the victim lost consciousness. The cruelty finding is sufficiently supported by the eyewitness testimony that the victim was taken to the car

> at knife point while Petitioner threatened her life, and evidence that she suffered over forty stab wounds, including defensive wounds, as well as blunt force injuries.

(Dkt. 105 at 12-13.) Additionally, the evidence contradicts Petitioner's contention that it is speculative to find that the victim suffered severe mental anguish. As relied on by the Arizona Supreme Court, Petitioner threatened the victim's life before taking her from the house, and Charlton testified that the victim had fear and terror in her eyes as Petitioner took her from the house (RT 12/15/94 at 22). Witness Tammy Winsett said she heard the victim say, "No," a couple of times as she was taken to the car. (RT 12/14/94 at 37.)

In sum, Petitioner presents nothing more than another way to look at the evidence. When the evidence is viewed in the light most favorable to the prosecution, as it must be, a rational trier of fact could find the cruelty prong of the (F)(6) aggravating factor, and the Arizona Supreme Court's holding to that effect is not objectively unreasonable. *See Jeffers*, 497 U.S. at 781; *Sarausad*, 479 F.3d at 678.

Heinous/Depraved Prong

The Arizona Supreme Court made the following findings regarding the murder being heinous and depraved:

> This court has defined "heinous" as "hatefully or shockingly evil" and "depraved" as "marked by debasement, corruption, perversion or

deterioration." Heinousness and depravity focus upon the "defendant's state of mind at the time of the offense, as reflected by his words and acts."

This court has set forth specific factors which, when found, may be used to justify a trial court's finding that a murder was especially heinous or depraved. The factors are: (1) whether the killer relished the murder; (2) whether the killer inflicted gratuitous violence on the victim beyond that necessary to kill; (3) whether the killer needlessly mutilated the victim; (4) whether the crime was senseless; and (5) whether the victim was helpless.

We find that the record supports the trial court's finding of heinous and depraved conduct. Defendant's statement to Charlton, "It's dead, but it's warm. Do you want a shot at it?" clearly shows that defendant relished the murder. The trial court found that this statement showed an abhorrent lack of regard for human life, and we agree. Furthermore, we find that defendant engaged in gratuitous violence beyond that necessary to cause death. Of the forty cutting and stab wounds, only three were potentially fatal. The other thirty-seven sharp-force injuries and the countless bruises were unnecessary and excessive.

We also find that the victim was helpless. Defendant held a knife to the victim's throat and forced her into the car. She was unarmed and

> partially clothed, with no means of escape. In the car, defendant was on top of her, abusing and stabbing her. The victim was unable to resist defendant's attack.
>
> Finally, the murder was senseless. A murder is senseless when it is unnecessary to achieve the killer's goal. Defendant's apparent goal was to be paid back for the money he wasted on the bad drugs. Killing the victim was unnecessary to accomplish this goal and in fact, ensured that he would neither be paid back, nor find out the identity of the drug dealer. In total, the record overwhelmingly supports a finding of heinous and depraved conduct.

Detrich II, 188 Ariz. at 68, 932 P.2d at 1339 (citations omitted).

Petitioner argues that the co-defendant's testimony relied on by the court to find that Petitioner relished the murder is unreliable, the multiple stab wounds do not demonstrate a shockingly evil mind or separate the crime from the norm of first degree murders, the murder was not senseless because it was ostensibly done for revenge, and nothing about the victim or the murder sets the victim apart from other murders regarding helplessness.

In an earlier order, the Court reached the following conclusion about Petitioner's arguments: "The factors of relishing the murder based on Petitioner's statement to his codefendant, gratuitous violence based on the excessive wounds and the

helplessness of the victim and senselessness of the crime are sufficiently supported by the record to uphold the heinous/depraved finding." (Dkt. 105 at 13-14.) Viewing the evidence in the light most favorable to the prosecution there is more than sufficient evidence from which a rational trier of fact could find the heinous/depraved prong of the (F)(6) aggravating factor, and the Arizona Supreme Court's holding to that effect is not objectively unreasonable. *See Jeffers*, 497 U.S. at 781; *Sarausad*, 479 F.3d at 678.

Finally, even if one prong of the (F)(6) factor were rebutted, Arizona law indicates that the finding of either especial cruelty or especial depravity alone will establish the (F)(6) factor and that the validity, or lack thereof, of the other prong does not affect the weight given to the circumstance. *See, e.g., State v. Djerf*, 191 Ariz. 583, 597, 959 P.2d 1274, 1288 (1998) ((F)(6) circumstance upheld based on cruelty alone without considering validity of depravity finding); *State v. Towery*, 186 Ariz. 168, 188, 920 P.2d 290, 310 (1996) (same); *State v. Bolton*, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995) (same); *State v. Roscoe*, 184 Ariz. 484, 500-01, 910 P.2d 635, 651-52 (1996) (upholding (F)(6) factor based on cruelty after invalidating depravity finding). Based on all of the above, Claim J is denied.

Claim L

Petitioner alleges he was entitled to a jury determination on the (F)(6) aggravating factor and the *Enmund/Tison* finding. Claim L is premised on *Ring v. Arizona*, 536 U.S. 584, 609 (2002), which found that

Arizona's aggravating factors are an element of the offense of capital murder and must be found by a jury. However, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court held that *Ring* does not apply retroactively to cases already final on direct review. Because Petitioner's direct review was final prior to *Ring*, he is not entitled to relief premised on that ruling.[14] Additionally, the Supreme Court has never held that *Enmund/Tison* findings must be made by a jury; to the contrary, the Court has held that a trial judge or appellate court may make that finding. *Cabana v. Bullock*, 474 U.S. 376, 387 (1986) (*Enmund* holds that the Eighth Amendment's bar on the death penalty is distinct from a person's guilt of a capital crime under state law), *overruled on other grounds by Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987).

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce Criminal Justice Act funds that might be consumed drafting an application for a certificate of appealability to this Court, the Court on its own initiative has evaluated the claims within the petition for suitability

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[14] To the extent Petitioner is arguing that the aggravating factor should have been alleged in the indictment, it also fails. The Supreme Court has long held that the Fifth Amendment provisions requiring indictment by a grand jury are not part of the due process of law incorporated as to *state* criminal prosecutions by virtue of the Fourteenth Amendment. *See Hurtado v. People of State of Cal.*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972).

for the issuance of a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a certificate of appealability ("COA") or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of the issues set forth in Claim B. For the reasons stated in this Memorandum of Decision and Order, as well as the September 23, 2005 and January 19, 2006 Orders addressing the procedural status and merits of other claims in the Amended Petition (Dkts. 93, 105), the Court declines to issue a certificate of appealability with respect to the remaining claims and procedural issues.

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 31) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on May 6, 2003 (Dkt. 3), is **VACATED**.

IT IS FURTHER ORDERED that the Court grants a Certificate of Appealability as to the following issue: Whether Claim B, alleging a violation of Petitioner's right to effective assistance of counsel at sentencing based on counsel's failure to investigate and present additional mitigation evidence concerning Petitioner's childhood abuse and neglect, PTSD, history of and genetic propensity for substance abuse, developmental and neurological issues, familial love, and adaptation to prison, fails on the merits.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 15th day of November, 2007.

s/_____
David C. Bury
United States District Judge

copy to Clerk, Arizona Supreme Court by cjs on 11/15/07

APPENDIX F

FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DAVID SCOTT DETRICH, *Petitioner-Appellant,*	No. 08-99001
v.	D.C. No. 4:03-cv-00229-DCB
CHARLES L. RYAN,* OF ARIZONA DEPARTMENT OF CORRECTIONS, *Respondent-Appellee.*	OPINION

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted
January 27, 2010—Pasadena, California

Filed August 20, 2010

Before: Harry Pregerson, M. Margaret McKeown, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez

*Charles L. Ryan is substituted for his predecessor Dora B. Schriro as Director of the Arizona Department of Corrections. Fed. R. App. P. 43(c)(2).

COUNSEL

Jennifer S. Bedier (argued), Arizona Capital Representation Project, and Gregory J. Kuykendall, Kuykendall & Associates, Tucson, Arizona, for petitioner-appellant David Scott Detrich.

Terry Goddard, Attorney General; Kent E. Cattani (argued), Chief Counsel; and Donna J. Lam, Assistant Attorney General, Tucson, Arizona, for respondent-appellee Dora B. Schriro.

OPINION

PAEZ, Circuit Judge:

An Arizona judge sentenced David Scott Detrich to death after a jury convicted him of murder, kidnapping, and sexual abuse. After exhausting his state remedies, Detrich filed a petition for habeas corpus in federal district court alleging, among other things, that his trial counsel was unconstitutionally ineffective at the penalty phase for failing to investigate and present substantial mitigating evidence and for failing to rebut the state's arguments that aggravating circumstances warranted a death sentence.[1] Applying the standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),

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[1] Detrich also raised claims relating to the guilt phase of his trial. We address those claims in a memorandum disposition filed concurrently with this opinion.

Pub. L. No. 104-132, 110 Stat. 1214, the district court denied relief. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Crime

As recounted in the Arizona Supreme Court's opinion on direct appeal, Detrich and a co-worker, Alan Charlton, left work on November 4, 1989, and went to a local bar in Benson, Arizona, where the two consumed between 12 and 24 beers each, according to Charlton's estimate. *State v. Detrich* (*Detrich II*), 932 P.2d 1328, 1331 (Ariz. 1997). The men then drove to Tucson, where they drank more beer at more bars. *Id.* Later that night, they picked up Elizabeth Souter, the eventual victim, who was walking along the road. *Id.* At Detrich's request, Souter directed him to a "roadhouse" where he could buy cocaine. *Id.* The two men and Souter then drove to Souter's home, where Detrich attempted to cook the cocaine in a spoon so that it could be injected. *Id.* When the syringe would not pick up the cocaine, Detrich began screaming that "the needle wasn't any good, or the cocaine wasn't any good" and told Souter that she would have to pay for the bad drugs by having sex with him. *Id.* Three witnesses—Charlton and two others—reported that Detrich was holding a knife against Souter's throat. *Id.*

Detrich then told Souter they were going for a ride, and Detrich, Charlton, and Souter left in Charlton's car. *Id.* Charlton drove, Detrich sat in the middle, and Souter sat on the passenger side, against the door. *Id.*

Charlton testified that, while stopped at a red light, he saw Detrich "humping" Souter and asking her how she liked it. *Id.* Soon thereafter, Charlton looked again and saw that Souter's throat was slit. *Id.* Charlton further testified that Detrich then hit Souter and asked her who gave her the drugs, and that Souter only gurgled in response. *Id.* at 1331-32. Detrich asked twice more, and Souter again responded with only a gurgle. *Id.* at 1332. Charlton claims that he never saw Detrich actually stab Souter, but that he himself was poked in the arm with a knife several times. *Id.* A pathologist established that Souter was stabbed forty times. *Id.*

Charlton testified that, at this point, Detrich said to him, "It's dead but it's warm. Do you want a shot at it?" *Id.* Charlton declined. *Id.* The two pulled over in a remote area approximately fifteen minutes from Souter's home, and Detrich dragged Souter's body into the desert. *Id.* The two men then drove to a friend's house in Tucson. *Id.* The friend testified that the men showed up at his house at 4 a.m., that Detrich was covered in blood, and that Charlton had blood only on his right side. *Id.* About an hour later, Detrich told the friend that he had killed a girl by slitting her throat because she had given them bad drugs. *Id.*

Several days later, the friend called in an anonymous tip to the police. *Id.* Based on the tip, the police arrested Charlton, who confessed to his involvement in the crime. *Id.* Several days later, Detrich was arrested in New Mexico with a folding knife in his possession. *Id.* Although Charlton admitted the knife was his, he explained that it often fell out of his pants, and that Detrich had the knife on the night

of the murder and the next morning, when it was covered in blood. *Id.*

Charlton entered into a plea bargain under which he pleaded guilty to kidnapping and agreed to testify against Detrich in exchange for the prosecution dropping the capital murder charge against him. Charlton was sentenced to ten and a half years' imprisonment.

B. 1990-1991 Trial, Sentencing, and Appeal

Detrich was charged with first-degree murder, kidnapping, and sexual assault. *State v. Detrich* (*Detrich I*), 873 P.2d 1302, 1304 (Ariz. 1994). Detrich's first trial ended in a mistrial when a prosecution witness mentioned that Detrich had invoked his right to remain silent at one point during the investigation. *Id.* After a retrial, the jury convicted Detrich of first-degree murder and kidnapping, acquitted him of sexual assault, and convicted him of the lesser-included offense of sexual abuse. *Id.* The state sought the death penalty. *See id.* at 1303.

Pursuant to Arizona law, the sentencing judge held a hearing to determine whether aggravating and mitigating circumstances were present. *See* Ariz. Rev. Stat. § 13-703(B) (1995).[2] Under Arizona law at the time, if the sentencing judge found one or more of ten enumerated aggravating circumstances, he had to impose the death penalty unless mitigating

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[2] Unless otherwise indicated, all citations to Arizona Revised Statutes § 13-703 are to the 1995 version of the law.

circumstances outweighed the aggravating factors. *Id.* § 13-703(E). At the sentencing hearing, the prosecution urged the court to find as an aggravating circumstance that the crime was "especially cruel, heinous, or depraved."

In response, defense counsel noted that a doctor had testified that he could not tell whether the victim had actually experienced conscious, physical pain and suffering and urged the court to find several mitigating circumstances. First, counsel argued that Detrich did not have the capacity to appreciate the wrongfulness of his acts or to conform his conduct to the law due to his extreme intoxication, and possible black-out, at the time of the murder. In support of this argument, counsel noted that Detrich had no known pattern of aggressive behavior and that Detrich's problems with alcohol had existed since he was nine years old. Further, defense counsel urged the court to find as mitigating circumstances Detrich's codefendant's mere ten-and-a-half-year sentence and Detrich's remorse.

Three days after this hearing, the trial judge sentenced Detrich to death, concluding that the murder had been committed in an "especially cruel, heinous, and depraved" manner, and that no mitigating circumstances were proven.

Detrich appealed his conviction and sentence to the Arizona Supreme Court. *See Detrich I*, 873 P.2d at 1303. That court reversed his kidnapping and murder convictions because of a defective jury instruction and remanded for a new trial on those charges. *Id.* at 1306 *07.*

C. 1994-1995 Trial, Sentencing, and Appeal

New counsel, Harold Higgins, was appointed for Detrich's retrial. The jury convicted Detrich of kidnapping and first-degree murder, but did not unanimously agree on a single theory of first-degree murder: nine jurors found premeditation; eleven found felony murder; and eight found both.

The prosecution sought the death penalty and filed a sentencing memorandum alleging as an aggravating circumstance that the crime was especially cruel, heinous, and depraved, and arguing that this aggravating factor outweighed the mitigating factors. In response, Detrich's counsel filed a three page sentencing memorandum that did not challenge the state's aggravation case, and instead argued that the court should not impose the death penalty because the jury's lack of unanimity about whether Detrich had committed premeditated murder or just felony murder indicated that the jury was not convinced that Detrich actually committed the murder. In addition, the memorandum pointed to new evidence presented at the second trial that suggested that Charlton, not Detrich, may have actually killed Souter.

The sentencing memorandum also listed five mitigating factors, with little elaboration or argument: Detrich's diminished capacity due to voluntary intoxication, his "abusive background," his lack of previous convictions involving serious injury or threat thereof, his remorse, and the minimal sentence received by his co-defendant. The only elaboration on any of these factors was a note that Detrich's "abusive

background" was "[f]ully detailed in" an October 18, 1994, letter from Detrich's sister, and an explanation that "[t]he evidence was clear that Defendant Detrich was highly intoxicated due to alcohol at the time of the incident, and perhaps had also ingested cocaine. In addition, [the sister's letter] makes it clear Defendant has a lengthy history of alcohol abuse and was encouraged into same by his parent-figures."

Higgins did little to bolster these arguments. He did not employ a mitigation investigator, nor did he ask his investigator, James Williams, to investigate mitigating evidence. In any event, Williams was not qualified to do a life history investigation. At most, Williams made phone calls to family members, but no one responded. According to Detrich's sister, Diana Jo Stevens, someone from the defense team contacted her shortly before the sentencing hearing and asked her to write a letter "about David." She wrote the letters not knowing what to include or for what purpose they would be used. In all, Higgins spent only ten and a half hours on the penalty phase of Detrich's trial, including the time spent at the penalty-phase hearings themselves.

In February 1995, the court held an aggravation/mitigation hearing. At the beginning of the hearing, Higgins gave the sentencing judge two more letters, totaling ten hand-written pages, from Detrich's sister, Diana Jo Stevens. One letter provided information about Detrich's abusive childhood, and the other letter simply made a plea for mercy. To give himself time to consider these newly submitted letters.

the trial judge scheduled the sentencing for two days later.

At the aggravation/mitigation hearing, the prosecution argued that the crime was "especially cruel, heinous, [and] depraved," an aggravating circumstance that could authorize a death sentence under Arizona Revised Statutes § 13-703(F)(6). The prosecution argued that the crime was "especially cruel" because Souter suffered a slit throat and forty-five knife injuries, some of which were defensive; because she was conscious during some of the attack, as indicated by her gurgling attempts to respond to Detrich's questions; and because she suffered mentally when she was held at knifepoint and threatened with sexual assault. In addition, the prosecution argued that the crime was "especially heinous or depraved" because it involved gratuitous violence, "well beyond that required to accomplish the killing"; because Detrich apparently relished the murder, as evidenced by his asking Charlton if he "want[ed] a shot" at the dead body and his telling a friend the next morning that he slit her throat because she had gotten him bad drugs; because the killing was senseless; and because the victim was helpless.

Higgins responded with three arguments: (1) Detrich was not death-eligible under *Tison v. Arizona*, 481 U.S. 137 (1987), because he did not actually commit the murder, (2) the crime was not especially cruel, heinous, or depraved, and (3) mitigating circumstances called for leniency. First, Higgins argued that Detrich was not death-eligible under *Tison v. Arizona*, given the "many uncertainties that now

exist as to what specifically happened, and as to who did what." In support of this argument, Higgins pointed to new evidence presented in Detrich's second trial suggesting that Detrich may not have actually committed the murder. Higgins argued that the jurors' failure to reach unanimous agreement that Detrich had committed premeditated murder reflected their doubt about Charlton's testimony that Detrich had murdered the victim. According to Higgins, if Detrich was not the perpetrator, he was not death-eligible under *Tison*.

Second, to rebut the prosecution's aggravation case, Higgins argued that the uncertainty about who actually committed the murder prevented finding that Detrich had acted in a cruel, heinous, or depraved manner. In addition, Higgins argued that many of the knife wounds were "minor"; that it was unclear whether Souter lived, and suffered, after the first of the most serious wounds was inflicted; and that Charlton's statement that Detrich had asked him if he "want[ed] a shot at" the dead body was of questionable credibility.

Third, Higgins argued that mitigating circumstances warranted leniency. In support of his mitigation case, Higgins called no witnesses, introduced as evidence only the three letters from Detrich's sister, Diana Jo Stevens, and made a short argument spanning only five transcript pages.

In his mitigation argument, Higgins first contended that Detrich's intoxication at the time of the crime diminished his capacity to appreciate the wrongfulness

of his conduct. Higgins explained that Detrich had a longstanding problem with alcohol, as he had been "encouraged by a parent at a very, very early age to engage in this type of alcohol abuse," and that, given this history, Detrich's intoxication should not be considered fully "voluntary." As the pre-sentence report ("PSR") and letters from Detrich's sister reported, Detrich had begun using alcohol at age eight or nine at the encouragement of his step-father, Skip. When Skip and Detrich's mother would fight, Skip would take Detrich and leave, and the two would stay out drinking all night long. When Detrich was about fifteen years old, he could guzzle a half-pint of whiskey in one drink for Skip's friends. Once, Skip and Detrich went on a week-long drinking spree and ended up three hundred miles away.

Higgins next briefly pointed to abuse Detrich suffered as a child as a mitigating factor. According to the letters from Detrich's sister, Detrich had suffered physical and mental abuse and had been introduced to drinking by his parents. Although Higgins did not present any live witnesses or other evidence that would compellingly portray Detrich's abusive childhood, the sentencing judge was aware of the basic facts of Detrich's upbringing from the PSR, psychological reports (none of which Higgins had provided the court), and the letters from Detrich's sister. In particular, the sentencing judge knew that Detrich was born with a cleft palate that was surgically corrected, that his parents divorced when he was young, and that he and his siblings began living with their father after his father and step-mother refused to let them return to their mother's home after a two-week visit. The

sentencing judge knew that Detrich was "severely mistreated and frequently physically abused" by his step-mother, Jean, who frequently told the children how much she hated them and did not want them around, once held Detrich underwater in the bathtub, and once tied him to a post outside, telling him he was no better than a dog. Detrich sometimes wet the bed at night, and Jean would spank him with a belt, make him wash the sheets before school, and publicly humiliate him about it. Once, Jean pushed Detrich's brother, Danny, down the basement steps and then put a pistol to Danny's head, screaming that she would kill the kids if they told their father what happened. After five years with their father, Detrich and his siblings moved back with their mother and Skip. Skip was verbally and physically abusive to Detrich's mother, who abused drugs and was "just there." As a child, Detrich would sometimes leave for two or three weeks, and his mother would never ask him where he had been.

At the aggravation/mitigation hearing, Higgins next pointed out that Detrich had no prior criminal record involving violence and that he had exhibited remorse about having been involved in the crime. Additionally, Higgins suggested that the short sentence given to Charlton should constitute a mitigating circumstance. Finally, Higgins urged the court to consider as mitigation the fact that Detrich had a ten-year-old son, "who ought to have some contact with some fatherly influence."

The prosecutor then rebutted defense counsel's arguments that there was residual doubt about who

actually committed the murder and that mitigating circumstances warranted a sentence less than death. The prosecutor dismissed the evidence of Detrich's abusive childhood because "there has to be some kind of causal connection between the abuse or the dysfunctional family background and the conduct." Higgins did not respond to this, or any other, argument.

Two days later, the court sentenced Detrich to death. The court found that Detrich was death-eligible under *Tison* and that the prosecution had proved the statutory aggravating circumstance that the crime was especially cruel, heinous, and depraved.

The court also found five mitigating circumstances to be present, but ascribed them little weight. Specifically, the court found as mitigating circumstances the fact that Detrich's intoxication significantly impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, his abusive background, his remorse, his lack of prior convictions involving violence, and the fact that his intoxication on the night of the murder stemmed from a longstanding history of alcohol and substance abuse. The court found that these mitigating factors were "not sufficiently substantial to outweigh the aggravating circumstances [sic] of having committed this offense in an especially cruel, heinous or depraved manner" and accordingly sentenced Detrich to death.

Detrich again appealed his conviction and sentence to the Arizona Supreme Court. *See Detrich II*, 932 P.2d

at 1331. The Supreme Court affirmed Detrich's sentence and convictions. *Id.* at 1340.

D. State Petition for Post-Conviction Relief

Detrich filed a petition for post-conviction relief in state court, alleging, among other things, that his trial counsel was ineffective for failing to present mitigating evidence and for failing to present an expert witness to rebut the state's aggravation case. Detrich's post-conviction counsel repeatedly requested funding for an investigator to assist in preparing Detrich's petition for post-conviction relief or, in the alternative, an evidentiary hearing on this request. The court denied the requests and ultimately ruled on the petition without appointing an investigator or holding an evidentiary hearing.

The post-conviction court, however, did grant funding for a neuropsychological expert, Dr. Robert Briggs, who produced a report on Detrich's neuropsychological functioning. The report concluded that Detrich's decision-making, especially when compromised by alcohol, "was not based on any consequence-driven thought process, but rather a leaned [sic] behavior that bypassed right or wrong." According to Dr. Briggs, Detrich's abuse led him to develop a "mindset . . . in which instinct took over and reason could not be accessed." On neuropsychological testing, Detrich performed "in the normal range of psychological function," earning a score of 25 on a scale for which scores between 0 and 26 were normal. Dr. Briggs's report explained, however, that this represented "a recovered picture," and that

"improvement in function occurs as time (and sobriety) from the incidents [of head injuries and drug use] increase." Dr. Briggs further opined that an interaction between Detrich's emotional status and mild neuropsychological deficits likely caused a greater overall impairment in function. Finally, the report concluded, among other things, that, as would be expected given his abusive childhood, Detrich was immature, alienated, self-indulgent, aggressive, impulsive, hostile, resentful, and irritable; that his abusive childhood could have taught him to use violence; and that he may have antisocial or paranoid personality or paranoid disorder. Detrich's post-conviction counsel requested an evidentiary hearing on the neuropsychological findings, explaining that Dr. Briggs could testify that Detrich was brain damaged and impulsive, and that his impulsiveness, combined with the effects of alcohol, constituted mitigating circumstances. The state court denied the request.

This report supplemented other new evidence that counsel presented to the state post-conviction court. As exhibits to the petition for relief, counsel attached statements by Detrich's mother, sister, and step-father that provided additional details about the abuse Detrich suffered as a child, the custody battle between his mother and father, his history of drinking alcohol with his step-father beginning at a young age, and car and motorcycle accidents that he had when he was younger.

In his petition for post-conviction relief, Detrich also contended that his trial counsel was ineffective for failing to present expert pathologist testimony that

would have rebutted the state's argument that the crime was especially cruel, heinous, or depraved by showing that Souter did not actually suffer.

After considering Detrich's arguments and the new mitigating evidence, the court summarily denied all of Detrich's claims. The state moved for reconsideration to clarify the court's findings in order to "insulate [them] from unwarranted federal review." The state submitted a proposed order, which the court adopted as its ruling on the petition for postconviction relief. The order—the last and only reasoned state-court judgment—dismissed in one paragraph Detrich's claim of ineffective assistance of counsel for failure to present mitigating evidence at the sentencing phase:

> Petitioner has not presented a colorable claim that trial counsel was ineffective at the sentencing stage of the proceedings for failing to have Dr. Briggs, a neuropsychologist, testify on Petitioner's behalf, or to present additional evidence of Petitioner's abusive background. After considering the initial psychological report, the presentence report, a sentencing memorandum, and written statements from Petitioner's sister citing multiple examples of both physical and mental abuse suffered by Petitioner as a child, this Court found statutory and non-statutory mitigating circumstances. Dr. Briggs' report was not significantly different from the report considered by this Court. Indeed Dr. Briggs found that Petitioner's general

> neuropsychological functioning was normal and showed an absence of cognitive dysfunction. Therefore, there is no reasonable probability that this testimony would have compelled this Court to impose a sentence less than death. Moreover, additional evidence of Petitioner's dysfunctional childhood would have been merely cumulative and was not "newly discovered." This claim is summarily dismissed.

The court similarly dismissed, in one short paragraph, Detrich's claim that his counsel was ineffective for failing to rebut the state's aggravation case:

> Petitioner failed to present a colorable claim that his trial counsel was ineffective in failing to retain an expert to rebut the State pathologist's testimony that the victim could have made "gurgling" sounds in response to questioning by Petitioner, after sustaining knife wounds to her throat. Contrary to an affidavit submitted by Petitioner, there was no testimony that the victim "engaged in conversation" or was conscious for a long period of time. The victim sustained four serious wounds to the neck, and it is merely speculative to assume that the victim's attempt to respond occurred after the most serious wound. No prejudice accrued to Petitioner, in any event, because evidence other than Charlton's testimony regarding

> the "gurgling" sounds independently supported a finding of cruelty at sentencing. Petitioner's claim that expert rebuttal testimony would have discredited Charlton's credibility is unavailing, where overwhelming evidence apart from Charlton's testimony supported the finding that Petitioner committed the murder. This claim is summarily dismissed.

In its conclusion, the court further clarified that "the Court finds that neither prong of the *Strickland v. Washington* test has been met as to any claims of ineffective assistance of counsel." Detrich appealed, but the Arizona Supreme Court denied review.

E. Federal Habeas Petition

Detrich filed a habeas petition in federal district court on April 29, 2003. The district court dismissed most of Detrich's claims without an evidentiary hearing, including his claim that his counsel was unconstitutionally ineffective at sentencing for failing to present expert evidence to rebut the state's aggravation case. The district court did, however, hold a four day evidentiary hearing on Detrich's claim of ineffective assistance of counsel at sentencing for failure to investigate and present mitigating evidence. At the hearing, Detrich's new counsel presented eighty-seven exhibits and called six live witnesses.

The district court concluded that Detrich's counsel performed deficiently by failing to investigate and present mitigating evidence. The court nonetheless

denied relief because it found that Detrich suffered no prejudice from his trial counsel's deficient performance. According to the district court, "despite extensive additional investigation into [Detrich's] background and mental health, [Detrich] has not discovered significant new or more weighty mitigation than was considered by the sentencing judge." Detrich appealed, and the district court granted a certificate of appealability on his claim that trial counsel was ineffective for failing to investigate and present mitigating evidence. We later also granted a certificate of appealability on his claim that trial counsel was ineffective for failing to rebut the state's aggravation case and on the two guilt-phase claims that we address in a concurrently filed memorandum disposition.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 2253. We review de novo the district court's denial of Detrich's petition for habeas corpus, and we review the district court's findings of fact for clear error. *Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007). Because Detrich filed his federal habeas petition after 1996, the AEDPA governs his action. *Id.*

The AEDPA requires that we defer to the last reasoned state court decision. *Id.* Specifically, 28 U.S.C. § 2254 provides that a federal court may grant a state prisoner's habeas petition with respect to a claim that was "adjudicated on the merits in State court proceedings" only if the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

For purposes of § 2254(d)(1), "clearly established Federal law" consists only of the holdings, and not the dicta, of Supreme Court opinions as of the time of the state court decision. *Terry Williams v. Taylor*, 529 U.S. 362, 412 (2000). However, we can also consider circuit precedent in assessing what constitutes "clearly established" Supreme Court law and whether the state court applied that law unreasonably. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

A state court decision is "contrary to" federal law under § 2254(d)(1) if it applies a rule that contradicts the governing law set forth in Supreme Court cases or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Terry Williams*, 529 U.S. at 405-06.

A state court decision involves an "unreasonable application" of federal law under § 2254(d)(1) if "the state court identifies the correct governing legal rule

from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case" or if it "either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams*, 529 U.S. at 407. The Supreme Court need not have applied a specific legal rule to a closely analogous fact pattern for the state court's decision to constitute an unreasonable application of clearly established federal law because "even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). A state court decision will involve an "unreasonable application" of clearly established federal law, however, only if the state court's decision was "objectively unreasonable," and not merely incorrect. *Terry Williams*, 529 U.S. at 409-10.

Finally, a state court's determination of fact is "unreasonable" under § 2254(d)(2) only if this court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record [before the state court]." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004).

In certain circumstances a federal court may also consider new evidence presented for the first time in the federal proceedings. *See* 28 U.S.C. § 2254(e)(2). When we consider such new evidence, we presume that the state court's factual findings are correct unless the petitioner rebuts that presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Taylor*, 366 F.3d at 1000.

III. DISCUSSION

Detrich contends that his trial counsel was ineffective because he failed to investigate and present mitigating evidence including social background and expert neuropsychological testimony at the penalty phase.[3] In reviewing this claim, we apply the "clearly established" standard for analyzing ineffective assistance claims that the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Terry Williams*, 529 U.S. at 391 ("It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.' "). Under *Strickland*, to prevail on his ineffective assistance of counsel claim, Detrich must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

A. Deficient Performance

We first consider whether the state court unreasonably applied *Strickland* when it concluded that Detrich's counsel did not perform deficiently by failing to investigate and present mitigating evidence

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[3] Detrich also contends that his counsel was unconstitutionally ineffective because he failed to offer expert forensic testimony to rebut the state's argument that the crime was especially cruel, heinous, and depraved. Because we conclude that Detrich is entitled to relief based on his counsel's failure to investigate and present mitigating evidence, we do not reach this second claim of ineffective assistance.

at sentencing.[4] Under *Strickland*, counsel's performance is deficient if, considering all the circumstances, it "fell below an objective standard of reasonableness . . . under prevailing professional norms." *Id.* at 688. In evaluating counsel's performance as compared to these "prevailing professional norms," we may refer to American Bar Association ("ABA") guidelines in effect at the time of the representation "as evidence of what reasonably diligent attorneys would do." *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009); *see also Strickland*, 466 U.S. at 688. Our review of counsel's representation is "highly deferential," as we apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that counsel's challenged omission "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

[1] *Strickland* establishes that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The Supreme Court has since made clear that this duty includes an obligation to "conduct a thorough investigation of the

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[4] Although the state court provided no reasoning to support its conclusion that Detrich failed to establish deficient performance under *Strickland*, its decision nonetheless is entitled to AEDPA deference. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) (applying AEDPA deference to a state court decision issued without explanation). Where a state court makes a decision on the merits but offers no supporting reasoning, a federal court must "perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable." *Id.* (internal quotations and citation omitted).

defendant's background." *Terry Williams*, 529 U.S. at 396; *see also Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (per curiam) (finding it "unquestioned" that counsel had this duty "under the prevailing professional norms" in 1989). Detrich's trial counsel, Harold Higgins, made no such reasonable investigation here, nor did he make any reasonable decision that made a thorough investigation unnecessary. Indeed, applying AEDPA deference, the Supreme Court has found deficient performance in cases where sentencing counsel did *more* than Higgins. We accordingly conclude that the Arizona post-conviction court unreasonably applied the clearly established federal law of *Strickland* when it concluded that Detrich's sentencing counsel's performance was not deficient.

1. No reasonable investigation

Detrich contends that Higgins devoted unreasonably little time to penalty phase preparations, failed to seek reasonably available mitigating evidence, and unreasonably failed to enlist the assistance of a mental health expert. We agree.

[2] Higgins did not begin work on Detrich's penalty phase until after the jury's guilty verdict and two weeks before the sentencing hearing. Higgins thus began preparing for the penalty phase even later than the counsel whom the Supreme Court found ineffective in *Terry Williams v. Taylor*, who had delayed penalty phase preparations until a week before trial. *Terry Williams*, 529 U.S. at 395. And Higgins's delayed initiation of penalty-phase preparations fell even further below the standards reflected in the ABA

guidelines in place at the time, which provided that counsel should begin conducting an investigation relating to the penalty phase of a capital trial immediately upon taking the case. Am. Bar. Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 11.4.1 (1989) [hereinafter 1989 ABA Guidelines], *available at* http://www.abanet.org/deathpenalty/resources/docs/1989Guidelines.pdf. With preparations delayed for so long, Higgins then spent only ten and a half total hours on the penalty-phase of Detrich's case.

[3] Higgins also did not employ a mitigation investigator, nor did he ask his investigator, who in any event was not qualified to do a life history investigation, to investigate mitigating evidence. At most, the investigator made phone calls to family members, with no response. According to Detrich's sister, Diana Jo Stevens, someone from the defense team contacted her shortly before the sentencing hearing and asked her simply to write a letter "about David." This fell below the prevailing professional standards as reflected in the 1989 ABA guidelines, which provided that the penalty-phase investigation for a capital trial should "comprise efforts to discover all reasonably available mitigating evidence," by drawing on sources including an interview with the accused, interviews with potential witnesses familiar with the defendant's life history, and expert assistance. 1989 ABA Guidelines at 11.4.1(C), (D).

[4] Higgins's minimal investigation cannot be justified by any reasonable reliance on the previous investigation conducted by Detrich's counsel at his first

sentencing in 1991. As Higgins himself acknowledged, Detrich's first trial counsel had conducted only a "very minimal" sentencing phase investigation and provided only a "very skeletal and not particularly useful file." Moreover, the first trial counsel's mitigation presentation had proven decidedly ineffective: after considering the minimal mitigating evidence that Detrich's first trial counsel presented, the trial judge found *no* mitigating factors to be present and accordingly sentenced Detrich to death.

[5] Higgins's extremely limited mitigation investigation was all the more unreasonable in light of the indications in the pre-sentence report, letters from Detrich's sister, and 1985 and 1991 psychological reports—all of which Higgins had seen[5]—that Detrich's past likely contained many mitigating circumstances. These documents put Higgins on notice that Detrich had an extremely troubled childhood involving abuse by his step-mother, alcohol abuse encouraged by his step-father starting at a very young age, a prolonged custody battle between his parents, drug abuse by his mother, and frequent absences from school. Despite this evidence that Detrich's background contained many mitigating circumstances, Higgins did not investigate further.

[6] In this way, Higgins's performance was strikingly similar to the counsel's performance that the Supreme Court found deficient in *Wiggins v. Smith*,

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[5] The 1985 psychological report was attached to the pre-sentence report, and Higgins acknowledged at the sentencing hearing that he had seen the 1991 psychological report.

539 U.S. 510, 525 (2003). In *Wiggins*, the defendant's attorneys had failed to investigate thoroughly a capital defendant's background, even though their limited investigation had revealed that the defendant's mother was an alcoholic, that the defendant was shuttled from foster home to foster home as a child, that the defendant frequently missed school, and that, at least once, his mother had left him and his siblings alone for days without food. *Id.* Applying AEDPA deference, the Supreme Court held that the state court unreasonably applied *Strickland* in finding counsel's performance adequate. *Id.* at 528-29. According to the Supreme Court, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.* at 525. Similarly, here, "any reasonably competent attorney" would have pursued an investigation into Detrich's childhood and the effects his childhood traumas had on him. Higgins's failure to do so fell below professional standards under any reasonable application of *Strickland*.

[7] Compounding this deficiency, Higgins's failure to consult a mental health expert also fell below professional standards. The 1989 ABA guidelines provided that an attorney "should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation." 1989 ABA Guidelines at 11.4.1(D)(7)(D). According to the 1989 guidelines, counsel should consider enlisting experts "to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced [and] to give a favorable opinion as to the client's capacity for rehabilitation." *Id.* at

11.8.3(F)(2). In addition, counsel should consider presenting expert testimony concerning the defendant's medical, family, and social history "and the resulting impact on the client, relating to the offense." *Id.* at 11.8.6(B)(8).

Consulting these guidelines, we recently held in a post-AEDPA case that the state court had unreasonably concluded that counsel was not ineffective where he failed to enlist a partisan mental health expert to help present a mitigation case at a sentencing that took place around the same time as Detrich's. *Jones v. Ryan*, 583 F.3d 626, 637-38, 640 (9th Cir. 2009); *see State v. Jones*, 917 P.2d 200 (Cal. 1996). In *Jones v. Ryan*, sentencing counsel had presented a court-appointed expert's psychological analysis of the defendant as part of his mitigation case. *Jones*, 583 F.3d at 630-31. Such an analysis by a "neutral" court-appointed psychologist, however, did not satisfy the defendant's right to have "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 638 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)). Counsel could not reasonably rely on the "neutral" expert's testimony because "[t]he responsibility to afford effective representation *is not delegable* to parties who have no obligation to protect or further the interests of the defendant." *Id.* (quoting *Lambright v. Schriro*, 490 F.3d 1103, 1120-21 (9th Cir. 2007)) (emphasis in original).

[8] Detrich's counsel did even less than the counsel whose performance we found deficient in *Jones*.

Higgins did not provide *any* expert mental health evaluations to the court, much less use them to bolster his mitigation case; he presented no live testimony by any mental health expert, court-appointed or otherwise; and he admits that he did not enlist the assistance of any mental health professional. Indeed, the only expert mental health reports before the sentencing judge were two 1985 evaluations by a state psychologist and psychiatrist that were attached to the PSR and a 1991 court clinic psychologist's evaluation that the state had provided the court.[6] In other words, unlike Jones's counsel, Detrich's counsel presented no expert mental health evidence at all. The fact that the sentencing judge had the 1985 and 1991 reports to consider did not excuse this failure; Higgins could not reasonably rely on these reports because they were not conducted by "partisan" experts. *See Jones*, 583 F.3d at 640. What is more, those reports were not based on a full account of Detrich's background and thus could not provide an "accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (noting that counsel have "an affirmative duty" to provide background information to mental health experts).

[9] Detrich's counsel's performance thus was strikingly similar to, or even worse than, the performances found deficient even after applying

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[6] The 1985 reports had been produced in connection with Detrich's earlier incarceration for writing worthless checks. The 1991 report was produced by a psychologist at a state-run clinic at the request of the attorney who represented Detrich in his first trial for Souter's murder.

AEDPA deference in *Terry Williams*, *Wiggins*, and *Jones*. We therefore must conclude that Detrich's counsel's failure to conduct a more thorough mitigation investigation and to enlist the assistance of a mental health expert constituted deficient performance under *Strickland*, and that the state court decision to the contrary was objectively unreasonable, unless special considerations made a thorough mitigation investigation unnecessary in this particular case.

2. No reasonable decision that made a thorough investigation unnecessary

[10] In some circumstances, a less-than-thorough mitigation investigation can nonetheless satisfy constitutional requirements if it is based on "a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The state contends that Higgins reasonably decided not to pursue a mitigation investigation here (1) because Detrich did not want to involve his family, and (2) because Higgins reasonably chose to pursue a residual doubt strategy that did not require a thorough mitigation investigation. We conclude that neither of these considerations justified limiting the mitigation investigation.

a

[11] Detrich's purported desire not to involve his family, and his family's alleged unavailability, did not justify limiting the mitigation investigation for three reasons. First, the record does not show that Detrich in fact discouraged Higgins from contacting his family.

While the PSR and a letter from Detrich's sister indicate that Detrich did not want to involve his family in the first sentencing, nothing indicates that Detrich felt the same way during his second sentencing, after having received one death sentence.

Second, even if Detrich did not want to involve his family, or if his family was uncooperative, that would not excuse Higgins's failure to seek expert assistance to explain the mitigating evidence that was known or his failure to seek evidence from other sources, such as medical records and records from Detrich's parents' custody battle. Indeed, even where a defendant is "actively obstructive," counsel must investigate available records. *See Rompilla v. Beard*, 545 U.S. 374, 381, 383, 389 (2005) (holding that the state court's conclusion that counsel did not perform deficiently was "objectively unreasonable" under the AEDPA).

Third, even if Detrich's desire not to involve his family in his first sentencing could reasonably be understood as an instruction not to present any mitigation case at all—which we doubt it could—such an instruction would not excuse counsel from conducting a thorough mitigation investigation. "A defendant's insistence that counsel not call witnesses at the penalty phase does not eliminate counsel's duty to investigate mitigating evidence or to advise the defendant of the potential consequences of failing to introduce mitigating evidence, thereby assuring that the defendant's decision regarding such evidence is informed and knowing." *Williams v. Woodford*, 384 F.3d 567, 622 (9th Cir. 2004). Although a defendant's informed wishes can justify failing to *present*

mitigating evidence, it cannot justify failing to *investigate* such evidence because counsel retains a duty to inform his client about the risks and potential benefits of presenting a mitigation case. *See id.*

b

[12] Detrich's counsel's sentencing-phase strategy of emphasizing residual doubt about whether Detrich had actually committed the murder likewise did not make a thorough mitigation investigation unnecessary. First, the record reveals that Higgins made no strategic choice to emphasize residual doubt to the exclusion of a classic mitigation presentation here. Higgins avowed in a declaration that his failure to conduct a thorough investigation of Detrich's background, or to present a fuller mitigation case at the penalty hearing, was not based on a sentencing strategy. Indeed, he avowed that, had he known the mitigating information about Detrich's past and mental health problems, he would have presented it. The fact that Higgins did present a limited mitigation case to the sentencing court corroborates this claim. *See Wiggins*, 539 U.S. at 526 (reasoning that counsel's presentation of a "halfhearted mitigation case" demonstrated that the failure to put on a stronger mitigation case was not a strategic choice).

Second, even if Higgins had made such a strategic choice, that choice would not have been reasonable. The Supreme Court has made clear that *the investigation* supporting a decision not to introduce mitigating evidence must be reasonable because a thorough investigation is necessary to make "a fully

informed decision with respect to sentencing strategy." *Wiggins*, 539 U.S. at 523, 527. Where a strategic choice is made " 'after less than complete investigation,' " a court must defer to that choice "only to the extent that 'reasonable professional judgments support the limitations on investigation.' " *Id.* at 533 (quoting *Strickland*, 466 U.S. at 690-91). As explained above, Higgins did not reasonably limit the investigation here because the information that Higgins knew about Detrich's past would have led "any reasonably competent attorney" to pursue further investigation. *See id.* at 525. Because it would not have been supported by a reasonable investigation, a strategy focusing on residual doubt to the exclusion of a classic mitigation defense would not have been reasonable.

[13] Moreover, we doubt that such a strategy would have been reasonable here, even if supported by an adequate investigation. Where a judge is likely to find an aggravating factor that would make the death penalty mandatory in the absence of sufficient counterbalancing mitigating evidence, counsel's failure to make a strong mitigation case falls short of professional standards. *Summerlin v. Schriro*, 427 F.3d 623, 640 (9th Cir. 2005). Here, it was likely that the sentencing judge would find such an aggravating factor: the previous sentencing judge had found that the crime was especially heinous, cruel, or depraved. And under Arizona law at the time, the presence of this factor required imposition of the death penalty unless the sentencing court found mitigating circumstances substantial enough to outweigh it. Ariz. Rev. Stat. § 13-703. Under *Summerlin*, professional standards therefore required Higgins to present a strong

mitigation case. He did not. Indeed, he did little to supplement the mitigation case from Detrich's first sentencing that had led the first sentencing judge to find *no* mitigating factors, much less sufficiently weighty ones. The only new evidence Higgins offered in support of leniency were the three letters from Detrich's sister.

[14] For these reasons, no special consideration justified Higgins's failure to pursue a thorough mitigation investigation here. Neither Detrich's purported wish not to involve his family nor his counsel's purported strategic choice to pursue a residual doubt strategy at sentencing made a thorough mitigation investigation unnecessary. Higgins s performance was therefore deficient under *Strickland*, and the state court's decision to the contrary was objectively unreasonable.

B. Prejudice

[15] Having concluded that the state court unreasonably held that Detrich's counsel did not perform deficiently, we must next determine whether the deficient performance prejudiced Detrich's defense. *See Strickland*, 466 U.S. at 687. Under *Strickland*, counsel's performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" of prejudice exists "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"; indeed, a "reasonable probability" need only be "a probability

sufficient to undermine confidence in the outcome." *Id.* In other words, Detrich suffered prejudice if "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. In assessing that probability, we "consider 'the totality of the available mitigation evidence . . .' and 'reweig[h] it against the evidence in aggravation.'" *Porter*, 130 S. Ct. at 453-54 (quoting *Terry Williams*, 529 U.S. at 397-98). In so doing, we do not consider the "idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Strickland*, 466 U.S. at 695.

Detrich presented volumes of new evidence of his extremely abusive childhood and new expert assessments of his brain damage and neuropsychological deficits for the first time in federal district court. Even without considering this compelling new evidence, however, we conclude that the state court unreasonably determined that Detrich was not prejudiced by his counsel's deficient performance. In particular, we conclude that there is a reasonable probability that the sentencing judge would have imposed a sentence less than death had Detrich's counsel obtained and presented an expert evaluation of Detrich's neuropsychological functioning.

1. State Court Decision

[16] The only evidence of Detrich's mental health before the sentencing judge was a 1991 psychological evaluation by a court clinic psychologist conducted at

the request of Detrich's first counsel and two 1985 reports, one by a state psychologist and the other by a state psychiatrist, from when Detrich was incarcerated for writing worthless checks. These reports provided only a snapshot of Detrich's psychological profile. The 1985 reports mentioned in passing that Detrich was impulsive, noting that he was "an impulsive individual" and that he had "occasional impulsive responses," while the 1991 report indicated to the contrary that a test that could reflect impulsivity was "not elevated." The reports concluded that he had above-average intelligence, with cognitive functioning largely intact. The 1985 reports contradictorily noted that he had poor judgment and that his judgment was "grossly intact." They noted that he externalized problems, was sensitive to rejection, had an impaired ability to relate to others, and had a low tolerance for frustration. The 1991 report concluded that he exhibited antisocial attitudes, beliefs, and behaviors, and that he had probable antisocial personality disorder.

Had Detrich's trial counsel enlisted the assistance of a neuropsychological expert, he would have been able to offer an evaluation with much greater mitigating weight. An evaluation by neuropsychologist Dr. Briggs that Detrich presented to the state post-conviction court indicated that Detrich suffered neuropsychological deficits and opined that his crime was driven by instinct that grew out of his abusive childhood, not by consequence-driven thought or reason.

[17] The state post-conviction court concluded that there was no "reasonable probability" that this neuropsychological evaluation "would have compelled this Court to impose a sentence less than death." In support of this conclusion, the state court reasoned, "Dr. Briggs' report was not significantly different from the report considered by this Court. Indeed, Dr. Briggs found that Petitioner's general neuropsychological functioning was normal and showed an absence of cognitive dysfunction."

[18] This conclusion was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). To be sure, Dr. Briggs's report did state that Detrich earned scores on neuropsychological tests that were "in the normal range of neuropsychological functioning." But the state court failed to mention a critical part of Dr. Briggs's assessment: his report later makes clear that this reflected a "recovered picture," as "improvement in function occurs as time (and sobriety) from the incidents [of head injuries and drug use] increase." Significantly, the report indicated that Detrich scored 25 on a scale for which 0-26 represented "normal" neuropsychological functioning. In other words, over ten years after the crime, at the time of these tests, Detrich's neuropsychological functioning was just two points shy of abnormal. Thus, considering Dr. Briggs's finding of "normal" functioning in context, along with his statement that this represented a "recovered picture," the most reasonable inference is that Detrich's neuropsychological functioning was *not* normal at the time of the crime.

[19] The state court's failure to account for Dr. Briggs's statement that Detrich's functioning had improved since the time of the crime resulted in an unreasonable determination of the facts. We have previously made clear that a state court unreasonably determines the facts when it "overlook[s] or ignore[s] evidence [that is] highly probative and central to petitioner's claim." *Taylor*, 366 F.3d at 1001. Evidence is sufficiently "probative" and "central" if it is "sufficient to support petitioner's claim when considered in the context of the full record bearing on the issue presented in the habeas petition." *Id.* The portion of Dr. Briggs's report suggesting that Detrich's neuropsychological functioning was almost certainly abnormally impaired at the time of the crime is central to Detrich's claim. As we explain at length below, if an expert would have testified about such abnormality at the sentencing, there is a reasonable probability that Detrich would not have received the death penalty. The "state court's failure to consider, or even acknowledge" this highly probative evidence therefore "casts serious doubt on the state-court fact-finding process and compels the conclusion that the state-court decision[] [was] based on an unreasonable determination of the facts." *Id.* at 1005.

2. De Novo Prejudice Assessment

[20] We proceed to consider whether Dr. Briggs's report, read as a whole, shows that there is a reasonable probability that Detrich's sentencing counsel's failure to seek and introduce expert neuropsychological evidence prejudiced Detrich's defense. As an initial matter, we must first determine

whether we must continue to apply AEDPA deference after having concluded that the state court's decision was "based on an unreasonable determination of the facts" under § 2254(d)(2). We conclude that the AEDPA imposes no such requirement.

The Supreme Court has made clear that "[w]hen a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied[, and a] federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti*, 551 U.S. at 953. In *Panetti*, the Supreme Court considered a post-AEDPA habeas petition by a prisoner alleging that he was incompetent to be executed. *Id.* at 934-35. In reviewing this claim, the Court first concluded that the state court had unreasonably applied clearly established law in implicitly concluding that it had offered constitutionally adequate procedures to resolve the prisoner's claim of incompetence. *Id.* at 952-53. Because the state court's determination of the merits of the prisoner's competency claim depended on those clearly inadequate procedures, the Supreme Court did not defer to that determination, but rather considered the merits de novo. *See id.* at 954.

We see no reason why our approach should differ where a state court's adjudication of a claim is dependent on an antecedent unreasonable determination of fact. Under § 2254(d), the unreasonable determination of fact alone authorizes a federal court to grant habeas relief—provided, of course, that the petitioner's constitutional rights were in fact violated. Section 2254(d) is phrased in the

disjunctive: we may grant relief only if the state court decision was contrary to or involved an unreasonable application of clearly established Supreme Court law *or* if the state court decision was based on an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d). Section 2254(d)'s plain language therefore does not require that a state court decision involve *both* an unreasonable determination of fact *and* an unreasonable application of law before we may grant relief.

[21] We therefore hold that, when a state court adjudication is based on an antecedent unreasonable determination of fact, the requirement set forth in § 2254(d) is satisfied, and we may proceed to consider the petitioner's claim de novo. The Eleventh Circuit, in a recent en banc decision with only one judge dissenting on an unrelated issue, agrees, and we have found no case from any other circuit that holds otherwise. *See Jones v. Walker*, 540 F.3d 1277, 1288 & n.5 (11th Cir. 2008) (en banc).

This understanding is consistent with the principle of deference. Because we do not know what the state court would have decided had it applied the law to the correct facts, there is no actual decision to which we can defer. Continuing to apply AEDPA deference even after concluding that the state court had unreasonably determined the facts to which it applied the law would therefore require us to assess the reasonableness of a decision that the state court never actually reached. Yet it is beyond question that the AEDPA does not require us to defer to such hypothetical decisions. For instance, on several occasions, the Supreme Court has

considered ineffective assistance of counsel claims under the AEDPA in cases where the relevant state courts had not reached one of the two *Strickland* prongs. *See Porter*, 130 S. Ct. at 452; *Rompilla*, 545 U.S. at 390. In those cases, the Supreme Court did not ask whether it *would have* been objectively unreasonable for the state court to decide the unreached *Strickland* prong adversely to the habeas petitioner, but rather reviewed that prong de novo, as there was no actual state court decision to which it could defer. *Porter*, 130 S. Ct. at 452; *Rompilla*, 545 U.S. at 390. Like the state courts that never reached one of the *Strickland* prongs in those cases, the state court here similarly never considered whether Detrich's defense was prejudiced by his counsel's failure to present expert evidence of Detrich's *abnormal* neuropsychological functioning. We therefore likewise examine this question de novo.

[22] Evaluating Detrich's claim of prejudice de novo, we conclude that, had his trial counsel presented expert evidence like that provided by Dr. Briggs, there is a "reasonable probability" that Detrich would have received a sentence less than death, particularly in light of the sentencing scheme in effect at the time. Under Arizona law at the time of Detrich's sentencing, the sentencing judge had to "weigh the mitigating circumstances against the aggravating circumstances to determine if leniency is required." *State v. Gretzler*, 659 P.2d 1, 13 (Ariz. 1983) (internal quotations and citation omitted). The law enumerated ten aggravating factors whose presence would require imposition of the death penalty unless the judge also found "mitigating circumstances sufficiently substantial to call for

leniency."[7] Ariz. Rev. Stat. § 13-703(E), (F). In weighing the aggravating and mitigating factors, "the number of aggravating and mitigating circumstances is not dispositive, but rather their gravity." *Gretzler*, 659 P.2d at 13. In Detrich's case, expert evidence demonstrating that he suffered from neuropsychological dysfunctions would have affected the "gravity" of the circumstances on both sides of the balance: it would have not only strengthened the mitigating circumstances, but also weakened the aggravating factor—that the crime was especially cruel, heinous, and depraved—that authorized Detrich's death sentence. We are therefore convinced that there is a reasonable probability that Detrich would have received a more lenient sentence had his trial counsel presented such evidence.

a

Dr. Briggs's report provides qualitatively new information that the sentencing judge did not consider: it indicated for the first time that the crime may have been driven by an instinctive, learned behavior that stemmed from Detrich's abusive past and by Detrich's neuropsychological deficits. This expert evidence would have added significant mitigating weight.

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[7] The statute enumerated five mitigating circumstances, but also authorized sentencing judges to consider other, non-statutory mitigating factors. Ariz. Rev. Stat. § 13-703(G); *accord State v. Castaneda*, 724 P.2d 1, 12 (Ariz. 1986) ("[The statute] lists some mitigating circumstances though the court is not limited to those listed but must set forth any mitigating factor which might call for leniency.").

First, Dr. Briggs explained how Detrich's upbringing shaped his psychological profile. He explained that Detrich's abusive background—in which he was "taught to fear and hate"—created "an atmosphere where the problem solving process is more 'take advantage of the person before the person does it to me.' " According to Dr. Briggs, "this stance makes perfect sense in the world where adults have and teach no boundaries and no respect, much less sympathy and feelings other than inappropriate touch and abuse." He further opined that the abuse Detrich suffered caused him to develop a mindset "in which instinct took over and reason could not be accessed." Dr. Briggs's analysis thus explains both the mindset that led Detrich to commit this crime and the cause of that mindset.

By suggesting a "causal nexus" between Detrich's abusive childhood and the crime, this expert analysis could "impact 'the quality and strength of the mitigation evidence.' " *State v. Tucker*, 160 P.3d 177, 201 (Ariz. 2007) (quoting *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006)). We have repeatedly noted that expert testimony like this can offer a powerful explanation of a defendant's crimes, and that the failure to introduce such evidence can therefore prejudice a defendant. In *Douglas v. Woodford*, we held that counsel's failure to present expert testimony explaining the possible causal link between the defendant's childhood and his crime was prejudicial. *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003). Although counsel had argued that the defendant's disadvantaged childhood had created a "demon" within him that had contributed to the crimes, that argument "lacked force without some expert

testimony to back it up." *Id.* Similarly, in *Caro v. Calderon*, we held that counsel may have prejudiced the defendant where he failed to present expert testimony "to explain the ramifications" of the defendant's life experiences on his behavior. *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). There is a reasonable probability that Detrich's counsel's failure to provide available expert testimony about how Detrich's abusive childhood influenced his psychological development and contributed to his crime likewise prejudiced Detrich's defense.

Second, Dr. Briggs's report not only offers an expert explanation of the causal link between Detrich's horrific childhood and his crime, but also raises the possibility that his neuropsychological deficits may have contributed to the crime. In addition to indicating that Detrich's neuropsychological functioning was almost certainly deficient at the time of the crime, Dr. Briggs's report also explains that Detrich's neuropsychological deficits interacted with his emotional status to cause "a greater overall impairment in function" and that being under the influence of drugs further inhibits Detrich's abilities. Neuropsychological deficits would likely have had greater mitigating weight than the diagnoses reflected in the psychological reports that the sentencing judge considered, which concluded only that Detrich had probable antisocial personality disorder. *See State v. Walton*, 769 P.2d 1017, 1034 (Ariz. 1989) (explaining that "some types of [mental] impairments clearly bear more weight than others," and that "personality disorders have not sufficed to tilt the balance in favor of leniency").

Although Dr. Briggs's report, standing alone, does not explain how Detrich's neuropsychological deficits would have affected his behavior, the state post-conviction court denied Detrich the opportunity to develop this evidence at an evidentiary hearing at which Dr. Briggs could have provided more detail about Detrich's deficits and their effects. In any event, the report does at least suggest some ways in which Detrich's deficits might have contributed to his crime. The report remarks on Detrich's impulsivity, calling him "very impulsive," noting impulsivity in several areas of testing, and characterizing his "basic problem" as being "impulsive and insist[ing] on having his own way regardless of the law or the feelings of other people." The report concludes that, given Detrich's history, his "decision-making, especially when compromised by alcohol, was not based on any consequence driven thought process, but rather a leaned [sic] behavior that bypassed right or wrong." Dr. Briggs's report thus at least raises the possibility that Detrich's neuropsychological deficits caused the impulsivity that contributed to his crime. There is therefore a reasonable probability that the failure to introduce such expert evidence prejudiced Detrich's defense.

[23] Moreover, expert analyses presented to the federal district court confirm that Detrich's neuropsychological deficits may have contributed to Detrich's crime in this way. Although Dr. Briggs's report alone convinces us that Detrich suffered prejudice from his counsel's failure to obtain and present an expert assessment of Detrich's neuropsychological functioning and of the effects of his

horrific childhood on his mental state, the additional evidence presented in federal court reinforces this conclusion.

[24] As an initial matter, we can properly consider this new evidence that Detrich presented for the first time in federal court, and that the state courts therefore had no opportunity to consider. We may consider such evidence so long as two conditions are met: First, the petitioner must have been "diligent in his efforts" to develop the evidence in state court. *Michael Williams v. Taylor*, 529 U.S. 420, 435 (2000); *accord Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam) (holding that new evidence can be considered so long as the petitioner "was not at fault in failing to develop that evidence in state court"). Second, the new evidence must not so "fundamentally alter the legal claim already considered by the state courts" as to render it unexhausted. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Here, Detrich exercised diligence by presenting the state court with evidence of neuropsychological impairment and requesting a hearing to develop that evidence further. *See Michael Williams*, 529 U.S. at 437 ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law."). He is not to blame for the state court's denial of that request.

Nor does the new evidence render Detrich's ineffective assistance of counsel claim unexhausted. "[N]ew factual allegations do not render a claim

unexhausted unless they 'fundamentally alter the legal claim already considered by the state courts.'" *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999) (internal quotations and citation omitted). The new evidence that Detrich presents does not. Detrich provided the state court with a neuropsychological expert's initial analysis indicating he had some neuropsychological deficits and explaining he exhibited "impulsive" behaviors. Moreover, his post-conviction counsel specifically informed the state court that "complete" testing could show Detrich's impaired ability to reason or function in stressful situations and a biological cause of his impairments, and requested a hearing at which evidence of Detrich's brain damage could be developed. The new evidence presented in federal court simply offers details about Detrich's brain damage, the biological causes of his impairments, and his impaired ability to function. The new evidence thus does not "fundamentally alter" Detrich's claims, and the state court had "a meaningful opportunity to consider" them. *Vasquez*, 474 U.S. at 257. Particularly because the failure to present the new evidence to the state court "stemmed from the state courts' refusal to grant [the petitioner] an evidentiary hearing on the matter, rather than from any failure of diligence on his part," the new evidence does not render Detrich's claim unexhausted. *Weaver*, 197 F.3d at 364.

The expert testimony that Detrich presented to the federal district court provides significant new details about Detrich's neuropsychological deficits, their behavioral effects, and their causes. Particularly considering this new evidence, we are left with no doubt that, had Detrich's trial counsel enlisted the

assistance of a mental health expert, there is a reasonable probability that Detrich would have received a sentence less than death.

In the district court, Detrich presented the expert opinion of neuropsychiatrist Dr. Amezcua-Patiño, who diagnosed Detrich with cognitive disorder secondary to congenital deficits and concluded that Detrich has "severe Neuro Psychiatric conditions that he acquired at birth, most likely as a result of Congenital malformations, worsened by significant abuse and neglect, and eventually further deteriorated by the use of drugs and alcohol." Dr. Amezcua-Patiño opined that Detrich's abnormal cognitive functioning "directly affected [his] ability to problem solve and control his actions . . . , including during the commission of [his] crimes," and "affected his ability to appreciate the wrongfulness of his actions." Another doctor, Dr. Froming, similarly noted damage in the frontalsubcortical areas of functioning, which resulted in impulsivity, impulsive errors, and problems in self-monitoring. Dr. Froming also described Detrich as "very fast responding with an inability to stop once he had started on something." Dr. Cuniff, a medical geneticist, similarly noted that when Detrich attempted a difficult task, he often would not abandon an ineffective strategy. According to Dr. Froming, when "[u]nder the influence of alcohol and other drugs, Mr. Detrich's ability to inhibit, plan ahead, make decisions, and perform in an error free fashion would be significantly reduced, especially given his neurological damage." Dr. Froming even remarked that Detrich's behavior during the testing "was so extraordinary that I have not witnessed it in any of my

previous evaluations since 1979." Finally, she opined that Detrich's functioning would have improved over time as he remained sober, indicating that Detrich's functioning would have been even more impaired at the time of the crime.

[25] All of these expert analyses indicate how Detrich's deficits could have affected his behavior in a way that could explain his crime: cognitive deficits caused him to act impulsively and impaired his ability to control his actions. Such an explanation could have significant mitigating weight. As the Supreme Court has recognized, evidence that a defendant's "violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation" could alter the selection of a penalty. *Terry Williams*, 529 U.S. at 398. Evidence that such a compulsive reaction stemmed from neuropsychological deficits would have even greater mitigating force. *Cf. Caro*, 280 F.3d at 1258 (holding that the failure to introduce evidence of physiological defects that can cause "impulse discontrol" can prejudice a defendant because such evidence could reduce a defendant's "moral culpability").

Dr. Amezcua-Patiño also offered more detail on how Detrich's abusive childhood could have led to his neuropsychological deficits. The development of the prefrontal cortex —which controls reasoning, problem solving, motivation, and response flexibility—is "vitally dependent on reciprocal interactions with an emotionally attuned caregiver." Abuse impedes the normal development of the brain and likely leads to an underdeveloped cortex and a hyperactive response to

stress. Extreme stress interferes with the functioning of the thinking part of the brain that is "particularly important in inhibiting the stress response." By establishing another causal link between Detrich's abusive childhood and his crime, this evidence would have increased the mitigating weight of Detrich's horrific childhood. *See Tucker*, 160 P.3d at 201.

In sum, had Detrich's sentencing counsel consulted a mental health expert to assist in the penalty phase of Detrich's second trial, he would have been able to present expert analyses showing how both neuropsychological deficits and Detrich's abusive childhood contributed to his crime. Had the sentencing judge heard such testimony, there is a reasonable probability that he would have afforded more weight to the mitigating circumstances.

The fact that the state has presented experts who disagree with Detrich's experts' analyses does not alter our conclusion. As the Supreme Court recently recognized, even where state experts identify problems with the tests and conclusions of defense experts, "it [is] not reasonable to discount entirely the effect that [the expert's] testimony might have had on the jury or the sentencing judge." *Porter*, 130 S. Ct. at 455.

Further, this is not a case where expert testimony is unnecessary because laypeople can easily understand the mitigating evidence without assistance. Recently, in *Wong v. Belmontes*, the Supreme Court held that a defendant did not suffer prejudice from his attorney's failure to introduce expert testimony about how the defendant's childhood could have contributed to his

crimes because "the body of mitigating evidence . . . was neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make." *Wong v. Belmontes*, 130 S. Ct. 383, 388 (2009). In *Belmontes*, however, the mitigating evidence was not about brain development and cognitive impairments, but rather about how traumas the defendant experienced as a child "caused him to 'los[e] ground in comparison with his peers [both] academically [and] socially' and 'intensified [his] sense of himself as defective, something from which he never recovered.' " *See Belmontes v. Ayers*, 529 F.3d 834, 853 (9th Cir. 2008), *rev'd*, 130 S. Ct. 383. Whereas a jury can use "its common sense or own sense of mercy," *Belmontes*, 130 S. Ct. at 588, to understand the psychological impact of an abusive childhood, a sentencer would likely need expert testimony to understand how a traumatic childhood could shape brain development in a way that would lead to impulsive behavior. Because expert testimony would provide additional explanations beyond a layperson's understanding of Detrich's inability to curb his impulses, there is a reasonable probability that this testimony would have increased the weight of the mitigating evidence.

b

[26] In addition to strengthening the mitigating evidence, the expert evidence of Detrich's neuropsychological dysfunctions would have weakened the statutory aggravating factor that the sentencing court found to authorize imposition of the death penalty, i.e., that Detrich's crime was especially cruel,

heinous, and depraved. Under Arizona law, "cruelty involves the pain and distress visited upon the victims, and . . . heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions." *Gretzler*, 659 P.2d at 10. Based on the evidence before it, the sentencing court found that the number and severity of wounds, some of which were defensive, showed that the crime was especially cruel, and that Detrich's words and actions at the time of the crime evidenced a heinous and depraved state of mind. For the reasons we explain below, evidence of Detrich's neuropsychological deficits could have provided an alternative explanation of Detrich's words and actions and accordingly could have decreased the weight of the "especially cruel, heinous, and depraved" aggravating factor.

To be sure, evidence of Detrich's neuropsychological dysfunctions would not bear on the cruelty of the crime, which focuses on the victim's suffering. *See Gretzler*, 659 P.2d at 10. Because there is therefore no reasonable probability that this expert evidence would have led the sentencing court to find no aggravating circumstances whatsoever, the death penalty would have remained an option. *See* Ariz. Rev. Stat. § 13-703(E), (F). Nonetheless, under Arizona law, sentencing judges look not only to whether an aggravating circumstance is present, but also to the weight of that aggravating circumstance. *See State v. Canez*, 42 P.3d 564, 596 (Ariz. 2002) (assessing the weight of the (F)(6) aggravating circumstance after reversing the finding of heinousness and depravity but upholding the finding of cruelty); *State v. Gulbrandson*, 906 P.2d 579, 604 (Ariz. 1995) (noting that "[t]he (F)(6)

aggravating circumstance would have even more weight if defendant had relished the murder"). Thus, even assuming that Detrich could not successfully rebut the state's argument that the murder was especially cruel, the neuropsychological evidence could diminish the weight of the aggravating factor by showing that the crime was not especially heinous and depraved.

Contrary to the district court's understanding, the heinous/depraved inquiry turns on the defendant's subjective state of mind, not on his mere words and acts. The Arizona Supreme Court has made clear that, to determine whether a crime was committed in an especially heinous or depraved manner, a court must consider "the killer's state of mind at the time of the offense," which "may be shown by his behavior." *State v. Lujan*, 604 P.2d 629, 636 (Ariz. 1979); *accord State v. Fulminante*, 778 P.2d 602, 620 (Ariz. 1988) ("The terms 'heinous' and 'depraved' focus upon a defendant's state of mind at the time of the offense, as reflected by his words and acts."); *State v. Martinez-Villareal*, 702 P.2d 670, 680 (Ariz. 1985) ("In order to determine depravity the court must focus on defendant's state of mind. Defendant's state of mind maybe inferred from behavior at or near the time of the offense." (citation omitted)). Because this factor focuses on a defendant's subjective state of mind, expert psychiatric evidence can demonstrate that a defendant's crime was not especially heinous or depraved. *See Summerlin*, 427 F.3d at 641-42 (holding that counsel's failure to present psychiatric evidence of a defendant's "lack of impulse and emotional control and organic brain dysfunction" prejudiced the defendant because that evidence "could

directly counter . . . that the crime had been committed in a 'heinous, cruel, or depraved manner' ").

The Arizona Supreme Court has identified five factors that can lead to a finding of heinousness or depravity: the defendant's relishing of the murder, infliction of gratuitous violence, mutilation of the victim, senselessness of the crime, and helplessness of the victim. *Gretzler*, 659 P.2d at 11. In Detrich's case, the sentencing judge found that four of the five factors—all but mutilation—were present. According to the sentencing judge, Detrich's asking Charlton if he wanted "a shot" at the "dead" but "warm" body indicated that Detrich relished the crime. The forty wounds evidenced gratuitous violence. And the crime was senseless in that the victim posed no threat to Detrich, and the victim was helpless. These factors led the sentencing judge to conclude that the crime was especially heinous and depraved.

[27] Expert testimony could have rebutted the finding that the gratuitous violence and Detrich's apparent relishing of the crime evidenced a heinous and depraved state of mind. First, expert testimony that Detrich exhibited an "inability to stop once he had started on something," and that his "ability to inhibit, plan ahead, [and] make decisions . . . would be significantly reduced, especially given his neurological damage," could have provided the sentencing judge with a different understanding of the victim's forty wounds. Rather than evidencing a "shockingly evil state of mind," *Gretzler*, 659 P.2d at 11, the sheer number of wounds reflected Detrich's impulsive and persistent behavior, which was caused by his

neurological deficits. The state argues that Detrich's brain dysfunctions do not explain the gratuitous violence because there is no evidence that he was out of control, as Detrich apparently directed Charlton to drive out of town, told him to pull over, and later lied that he had been in a fight when his friend asked why he was covered in blood. That Detrich may have regained control after committing the murder, however, does not indicate that he also had control over his impulses while inflicting the wounds.

Second, given the neuropsychological evidence, there is a reasonable probability that the sentencing judge would have concluded that Detrich's comment offering Charlton "a shot" at the dead body evidenced impulsivity and immaturity, not relishing of the killing. Indeed, the Arizona Supreme Court has acknowledged that "post-murder statements suggesting indifference, callousness, or a lack of remorse constitute 'relishing,' only when they indicate, beyond a reasonable doubt, that the killer savored or enjoyed the murder at or near the time of the murder." *State v. Greene*, 967 P.2d 106, 115-16 (Ariz. 1998). The Arizona Supreme Court has, for example, found that a defendant's statement that he had "clubbed" a "faggot," while callous, did not establish relishing. *Id.* at 115. Similarly, that court rejected a finding of relishing where a defendant bragged that his victim had "squealed like a rabbit." *State v. Graham*, 660 P.2d 460, 463 (Ariz. 1983). In that case, the court attributed the defendant's statement not to his savoring of the crime, but to his immaturity and need to impress his peers, which a psychological report had noted. *Id.* Similarly, here, expert analyses would have reported

that Detrich was "very immature" and impulsive. These neuropsychological characteristics, explained in part by Detrich's brain development and abusive childhood, could have provided an alternative explanation of Detrich's callous statement to Charlton: his statement reflected immaturity and impulsivity, not his enjoyment of the act of killing Souter.

Thus, expert testimony about Detrich's neuropsychological dysfunctions could have shed a different light on Detrich's words and actions at the time of the crime. Had the sentencing judge heard expert testimony about Detrich's impulsivity, inability to change a course of action once started, and immaturity, there is a reasonable probability that he would have concluded that the callous statement to Charlton and the number of wounds reflected these neuropsychological characteristics, not relishing or knowing infliction of gratuitous violence that reflected a heinous and depraved state of mind. And there is more than a reasonable probability that this expert evidence would have at least precluded the sentencing judge from finding *beyond a reasonable doubt* that Detrich's actions reflected a heinous and depraved state of mind. *See State v. Jordan*, 614 P.2d 825, 828 (Ariz. 1980) (holding that aggravating circumstances must be proven beyond a reasonable doubt). Moreover, had the sentencing judge not found gratuitous violence or relishing, he almost certainly would not have found the crime to have been especially heinous or depraved, because the other two factors urged by the state — senselessness of the crime and helplessness of the victim—rarely support a finding of heinousness and

depravity on their own. *See State v. Hyde*, 921 P.2d 655, 684 (Ariz. 1996).

[28] There is therefore a reasonable probability that expert evidence of Detrich's neuropsychological deficits would have changed the aggravation side of the sentencing balance. Because there is a reasonable probability that the sentencing judge would not have found Detrich's crime to be especially heinous and depraved, there is a reasonable probability that he would have afforded less weight to the aggravating factor that authorized imposition of the death penalty here. If the aggravator had less weight, it would of course take less mitigating evidence to outweigh it.

c

Had Detrich's trial counsel presented expert evidence of Detrich's neuropsychological dysfunction, there is a reasonable probability that the sentencing judge would have ascribed more weight to the mitigating circumstances and less weight to the aggravating circumstance that the crime was especially heinous, cruel, or depraved. Critically, there is a reasonable probability that these changes in weights on both sides of the sentencing balance would have resulted in a sentence less than death.

[29] This is not a case where the aggravating factors are so overwhelming that a death sentence was all but assured. First, even for very gruesome crimes, the death penalty is not necessarily unavoidable. *Douglas*, 316 F.3d at 1091. Second, we have found that aggravating circumstances are so significant as to

preclude a finding of prejudice only where the aggravating circumstances were worse, and the omitted mitigating evidence weaker, than those here. For example, in *Bible v. Ryan*, we held that the severity of the aggravating factors precluded a finding of prejudice where the defendant had kidnaped, stripped, molested, tied up, and murdered a nine-year-old girl, and where the omitted mitigating evidence showed only that the defendant had high fevers as a child that theoretically could have resulted in organic brain damage. *Bible v. Ryan*, 571 F.3d 860, 863-64, 870 (9th Cir. 2009). Here, not only are the aggravating circumstances of Detrich's crime less egregious, but he has offered evidence that he *actually* suffers organic brain damage that could help explain his crime. *Cf. Bible*, 571 F.3d at 871 (emphasizing that the defendant did not contend that he *actually* had organic brain damage in concluding that the failure to introduce this evidence did not prejudice him). The aggravating factors similarly far outweighed the omitted mitigating evidence in *Woodford v. Visciotti*, where the Supreme Court held that the state court was not objectively unreasonable in finding no prejudice where a defendant, who had previously knifed a man and stabbed a pregnant woman, had committed a pre-planned armed robbery that involved an execution-style killing and another attempted killing. *Woodford v. Visciotti*, 537 U.S. 19, 26-27 (2002). There, the mitigating evidence that counsel failed to present was far weaker than that here: the defendant had been berated as a child, had no self-esteem, moved twenty times growing up, was born with club feet, and suffered from depression, feelings of inadequacy and incompetence, and a possible seizure disorder. *Id.* at

26. Similarly, in *Cox v. Ayers*, we recently found no prejudice where the "weight of the aggravating factors was staggering," as the petitioner had "set out to kill everyone in [a] house, including children sleeping in their beds, . . . for money." *Cox v. Ayers*, No. 07-99010, 2010 WL 2853764, *15 (9th Cir. July 22, 2010). Balanced against these "staggering" aggravating factors was "mostly cumulative" evidence of the petitioner's abusive childhood, but no evidence, new or otherwise, of any neuropsychological deficiencies that could explain the crime. *Id.* at *12, *15.

[30] Because the mitigating evidence that Detrich's counsel failed to present is powerful, and because the aggravating circumstances surrounding Detrich's crime are not so severe as practically to preclude a finding of prejudice, there is a reasonable probability that the new evidence of Detrich's neuropsychological dysfunctions would have led the sentencing judge to conclude that the mitigating circumstances outweighed the aggravating circumstances and accordingly to impose a sentence less than death.[8]

[31] In sum, Detrich's trial counsel's failure to conduct an adequate penalty phase investigation, and the resulting failure to present powerful available mitigating evidence, deprived Detrich of his Sixth

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[8] Because we conclude that the failure to introduce such expert mental health evidence alone prejudiced Detrich's defense, we need not decide whether Detrich's counsel's additional failure to introduce evidence of Detrich's abusive childhood, his successful adaptation to prison, or the impact that his execution would have on his family also prejudiced him.

Amendment right to the effective assistance of counsel. The state court unreasonably applied *Strickland* in concluding that counsel's performance was not deficient. Moreover, the state court's conclusion that Detrich's counsel's performance did not prejudice Detrich's penalty-phase defense was based on an unreasonable determination that Dr. Briggs's report indicated that Detrich's neuropsychological functioning was normal. Because available expert neuropsychological evidence that Higgins failed to obtain and present would have provided a powerful explanation of Detrich's crime, we conclude that there is a reasonable probability that Detrich would have received a sentence less than death if Higgins had provided adequate representation. We therefore hold that Detrich is entitled to habeas relief on his penalty phase ineffective assistance of counsel claim.

IV. CONCLUSION

For the reasons explained above, we reverse the district court's denial of habeas relief on Detrich's penalty phase ineffective assistance of counsel claim. The case is remanded for the district court to issue a writ of habeas corpus vacating Detrich's death sentence unless the state re-sentences Detrich within a reasonable time set by the district court. If the state chooses not to re-sentence, Detrich's sentence will automatically be converted to life in prison in accordance with Arizona law.

REVERSED and REMANDED.

APPENDIX G

FILED
OCT 28 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCOTT DETRICH,	) No. 08-99001
Petitioner-Appellant,	) D.C. No. 4:03-cv-00229-DCB
v.	) District of Arizona Tucson
CHARLES L. RYAN, OF ARIZONA DEPARTMENT OF CORRECTIONS,	) ORDER
Respondent-Appelllee.	)

Before: PREGERSON, McKEOWN and PAEZ, Circuit Judges.

The panel has voted to deny the petition for panel hearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.